(9)

No. 94-270-CFY
Status: GRANTED

Title: United States, Petitioner
v.
Robert P. Aguilar

Docketed:
August 11, 1994

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Luskin,Robert D., Meltzer,Paul B.

7-11-94 ext til 8-17-94, J. O'Connor, CITED.

Entry	Date	Note	Proceedings and Orders
1	Jul 11 1994	G	Application (A94-18) to extend the time to file a petition for a writ of certiorari from July 18, 1994 to August 18, 1994, submitted to Justice O'Connor.
2	Jul 11 1994		Application (A94-18) granted by Justice O'Connor extending the time to file until August 17, 1994.
3	Aug 11 1994	G	Petition for writ of certiorari filed.
5	Aug 19 1994		Order extending time to file response to petition until October 14, 1994.
6	Oct 14 1994		Brief of respondent Robert P. Aguilar in opposition filed.
7	Oct 19 1994		DISTRIBUTED. November 4, 1994 (Page 2)
8	Oct 27 1994	X	Reply brief of petitioner United States filed.
10	Nov 7 1994		REDISTRIBUTED. November 10, 1994 (Page 19)
12	Nov 17 1994		REDISTRIBUTED. November 23, 1994 (Page 36)
13	Nov 28 1994		Petition GRANTED.
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14	Jan 12 1995		Joint appendix filed.
15	Jan 12 1995		Brief of petitioner United States filed.
16	Jan 30 1995		SET FOR ARGUMENT MONDAY, MARCH 20, 1995. (1ST CASE).
17	Feb 1 1995		CIRCULATED.
18	Feb 13 1995	X	Brief of respondent Robert P. Aguilar filed.
19	Feb 13 1995	X	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
20	Feb 21 1995		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Ninth Circuit.
21	Feb 27 1995		Record filed.
		*	Original record proceedings United States District Court for the Northern District of California(4 BOXES-SEALED)
22	Mar 10 1995	X	Reply brief of petitioner filed.
23	Mar 20 1995		ARGUED.

No.

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT P. AGUILAR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an individual who endeavors to obstruct a grand jury proceeding by making false and misleading statements to prospective witnesses may be prosecuted for obstruction of justice, within the meaning of 18 U.S.C. 1503.

2. Whether an individual who knows of an application for authorization to intercept telephone conversations and who discloses its existence to a target in order to impede the interception of the target's conversations may be found guilty of violating 18 U.S.C. 2232(c), regardless of whether the authorization has expired at the time the disclosure was made.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No.

UNITED STATES OF AMERICA, PETITIONER

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ROBERT P. AGUILAR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the en banc court of appeals (App., *infra,* 1a-28a) is reported at 21 F.3d 1475. The opinion of the panel of the court of appeals (App., *infra,* 29a-113a), which was subsequently vacated, is reported at 994 F.2d 609.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1994. On July 11, 1994, Justice O'Connor extended the time for filing a petition for a writ of certiorari to August 17, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 18 U.S.C. 1503 provides:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

2. 18 U.S.C. 2232(c) provides, in relevant part:

> Whoever, having knowledge that a Federal investigative or law enforcement officer has been authorized or has applied for authorization under chapter 119 [of Title 18] to intercept a wire, oral, or electronic communication, in order to obstruct, impede, or prevent such interception, gives notice or attempts to give notice of the possible interception to any person shall be fined under this title or imprisoned not more than five years, or both.

STATEMENT

This case arises from the prosecution of respondent United States District Judge Robert Aguilar of the Northern District of California. He was convicted after a jury trial on two counts of a multi-count indictment. One count charged respondent with obstruction of justice, in violation of 18 U.S.C. 1503. The other count charged respondent with disclosing a wiretap with the intent of obstructing or impeding it, in violation of 18 U.S.C. 2232(c). The en banc Ninth Circuit reversed the convictions on both counts. App., *infra,* 1a-28a.

1. In 1986 and 1987, as part of a nationwide investigation of health care provider fraud, the San Francisco office of the Federal Bureau of Investigation was investigating Michael Rudy Tham, a convicted former Teamster official, and Abe Chapman, an individual with longstanding criminal ties who was then under indictment. App., *infra,* 3a, 5a, 6a; 7 Tr. 983, 1008. Chapman was a distant relative of respondent; his wife's daughter had at one time been married to respondent's brother. App., *infra,* 3a. On April 12, 1987, the government applied to then-Chief Judge Peckham of the United States District Court for the Northern District of California for authorization to conduct electronic surveillance of Tham's business telephones, pursuant to 18 U.S.C. 2516. The application named Chapman as an individual whose communications were to be intercepted. See 18 U.S.C. 2518(1)(b)(iv). By statute, the wiretap could run for no more than 30 days unless extended, see 18 U.S.C. 2518(5), and it therefore expired on May 20, 1987. App., *infra,* 5a. However, beginning on July 15, 1987, Judge Peckham signed a series of orders postponing the service of notices of the wiretap on the interceptees and maintaining the secrecy of the wiretap through April 25, 1989. 7 Tr. 918-919.

On July 9, 1987, FBI agents saw respondent leave the federal courthouse with Chapman. App., *infra,* 3a, 5a-6a; 7 Tr. 964. On August 5, the FBI advised Judge Peckham that Chapman and respondent had been seen together. App., *infra,* 6a. As Judge Peckham later testified at trial, he warned respondent four days later at an ABA reception "that in the course of a wiretap application that the name Abie Chapman had come up," that Judge Peckham had prosecuted Chapman "in a notorious narcotics" case in 1951, and that Chapman "had been a member of a sinister East Coast criminal organization and that he was convicted and sentenced to a substantial term." 7 Tr. 921. Judge Peckham testified that he spoke to respondent because he was "concerned that * * * associating with a notorious felon would create an appearance of impropriety." 7 Tr. 922. Judge Peckham "feared that Chapman might be going to use the judge's prestige of his office in the furtherance of Chapman's interest." *Ibid.*

Tham wanted to have his prior conviction for embezzlement and making false entries in union records overturned so that he could resume his union activities. After consulting with Chapman and attorney Edward Solomon, who had been a law school classmate of respondent, Tham filed a Section 2255 motion in mid-July 1987, seeking to vacate his prior conviction. Tham, Solomon, and Chapman hoped to use Chapman's and Solomon's ties to respondent to obtain help and advice from respondent with regard to the Section 2255 motion. Chapman and Solomon, who hoped to have respondent influence Judge Weigel, met with respondent and called him periodically with regard to the Section 2255 motion. Respondent checked on the scheduling of the Section 2255 motion, and asked Judge Weigel if a hearing had been set. App., *infra,* 3a-4a.

Meanwhile, the wiretap on Tham's phones began again on September 11, 1987. On October 12, 1987, the wiretap once again expired, but it was reinstituted on October 22, 1987, and subsequently extended through May 8, 1988, when it finally expired. By October, the wiretap was directed in part at investigating the apparent attempt improperly to influence Judge Weigel, and Chapman continued to be named as an interceptee. App., *infra,* 5a. On January 13, 1988, the FBI obtained authorization to expand its electronic surveillance to the telephone of respondent. Gov't Exh. 1B.

The charge that respondent disclosed wiretap information arose out of the events of February 6, 1988. On that date, Chapman visited respondent at his house. As Chapman was leaving, respondent noticed a surveillance unit on the street in front of his house. Respondent immediately called his nephew, Steve, and asked him to come to the house "right now, it's very, very urgent." Tape N-504. Respondent stated that "[i]t'll only take a minute, but it's very important you come here please." *Ibid.* He also told Steve that "I need to get a message to [Chapman], who was just here a minute ago. * * * But I can't talk over the phone." *Ibid.* Steve testified at trial that, upon his arrival at respondent's house, respondent told him that "he recognized a car taking off following Abie [Chapman] and he recognized the driver as an FBI agent." 5 Tr. 824. Respondent also told Steve "that he had overheard at work about the possibility of Abie's phone being wiretapped." 5 Tr. 825. Steve drove to Chapman's house and informed Chapman of those facts. *Ibid.* Later that day, respondent called Steve again and asked him to come to respondent's house. When Steve arrived, respondent asked Steve if he had seen Chapman. Steve assured respondent that he had given the information to Chapman. Respondent ex-

plained that he called Steve over because he "didn't really know what phones were tapped." 5 Tr. 828.

Thereafter, Chapman used an alias ("Dr. Green") when he called respondent. See, *e.g.*, Tape O-1449, O-2022, O-3092. On February 29, 1988, Chapman told Tham that someone "very big" had told him that his phone was tapped. Tape M-1189. Respondent, Chapman, Tham, and Solomon continued to discuss Tham's Section 2255 motion. In conversations with Chapman ("Dr. Green"), respondent discussed Solomon's representation of Tham. On April 20, for example, Chapman called respondent, who requested that Chapman "ask * * * Solomon to call me today." Tape O-6238. Chapman relayed the message to Tham. Tape H-6276. Using an agreed-upon code, Tham gave the message to Solomon. Tape H-6289, H-6299. As Solomon later reported back to Tham, when he called respondent, respondent dictated the language for a motion requesting a hearing on Tham's Section 2255 motion and told Solomon to file it. Tape J-4494. On April 23, 1988, Judge Weigel recused himself from the case. 9 Tr. 1236; Gov't Exh. 16.

On May 17, 1988, respondent and Solomon met for lunch. Solomon was cooperating with the government by this time and was secretly recording the conversation. During lunch, respondent said that he "knew" the FBI was wiretapping Chapman because Peckham had told him. Resp. C.A. Excerpts of Rec. 6. Respondent made quite clear that he believed that Chapman's telephone was "definitely tapped," *id.* at 17, and respondent admitted that he "told [his] nephew" and said to the nephew "I want you to tell him not over the phone," but to "get to his house and tell him." *Id.* at 18. Respondent also stated that

> once I found out that they were tapping the guy's phone the first thing I ask him, where are you calling me from? The pay phone. See I can hear the traffic.

> It's okay. What do you want? I wouldn't talk to him any other time. One time he called me I said where you calling me from?" Marilyn's house. I said well I'm busy right now you'll have to call me some other time.

Id. at 22-23. Respondent also told Solomon to tell authorities that "I [respondent] had nothing to do with you regarding this case," *id.* at 10, and that, if Solomon needed to call respondent at his chambers, he should "just say on, over the phone just say to me god I ran into some of our . . . our classmates" and "we oughta have lunch together." *Id.* at 34. Finally, he told Solomon that, if asked concerning his contact with Solomon, he was going to claim Solomon asked for advice about a "wrongful discharge" case. *Id.* at 26. At the end of the lunch, respondent stated, "As far as I'm concerned we discussed a wrongful termination case." *Id.* at 35.

The obstruction of justice count arises from a secretly recorded interview with respondent conducted on June 22, 1988, by Agent Carlon and another agent of the FBI. The two agents visited respondent and informed respondent that there had been an allegation that, at Chapman's request, respondent had "attempted to intervene" in Tham's Section 2255 motion. Resp. C.A. Excerpts of Rec. 57.

Respondent made a number of false statements to the agents. For example, respondent stated that he had found out "recently" that Solomon was Tham's lawyer. Resp. C.A. Excerpts of Rec. 62. He stated that he "simply didn't discuss" the Tham case with Solomon, *id.* at 64, even when the two had had lunch together. *Id.* at 62. See also *id.* at 69 ("I never discussed it with Solomon."). He said that Solomon had asked him "how to proceed on a um wrongful termination or employment discrimination" case. *Id.* at 66.

Agent Carlon informed respondent that Chapman had been observed leaving his house to make calls from a pay phone and then immediately returning home. Carlon stated his view that Chapman was acting like those who "suspect perhaps that their phones are tapped." Resp. C.A. Excerpts of Rec. 70. Respondent replied, "Well he can't have learned that from me because I don't . . . I don't know anything about that." *Id.* at 71. Respondent also denied that he had "ever f[ou]nd out or learn[ed] of any wire tap order on Abe Chapman." *Ibid.* See also *id.* at 72. At the conclusion of the interview, respondent returned to the subject of his conversations with Chapman and stated:

> As you can see my conversations with him aren't very long, you know, and my and my visits with him aren't very long. He'll call me and say well I saw your mother and father and they're fine goodbye.

Id. at 79. At that point, the transcript indicates "(laughter)," followed immediately by respondent's adding: "And that's it." *Ibid.*

Early in the interview, respondent asked whether he was "some kind of target" of the investigation and stated that he "assume[d] from this * * * that I very likely am if I've done anything wrong." Resp. C.A. Excerpts of Rec. 57. Agent Carlon responded, "Yeah." *Ibid.* Later, respondent asked again if he was a target. *Id.* at 73. Agent Carlon stated that "certainly some of this evidence is pointing in your direction and I'd have to say yes * * * there is a grand jury meeting" and that "some evidence will be heard I'm . . . I'm sure on this issue." *Ibid.* Later, respondent again said that he was "concerned" that a grand jury would meet "to determine whether or not they should return some indictment * * * against me for obstructing justice." *Id.* at 74.

2. On June 13, 1989, an eight-count indictment was returned against respondent, Tham, and Chapman. Respondent was charged with conspiring to defraud the United States and to endeavor to obstruct justice, in violation of 18 U.S.C. 371; four counts of endeavoring to obstruct justice, in violation of 18 U.S.C. 1503; two counts of illegally disclosing a wiretap application, in violation of 18 U.S.C. 2232(c); and one count of violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c). On March 19, 1990, a jury acquitted respondent on one count of obstructing justice and deadlocked on the remaining counts against respondent and the other defendants. App., *infra,* 4a, 30a.

The cases were severed, and the trial court granted the government's motion to dismiss the RICO count and one of the obstruction of justice counts against respondent. After a retrial on the remaining counts, respondent was found guilty of one count of obstruction of justice and one count of illegally disclosing a wiretap application. He was acquitted on the remaining counts. Respondent was sentenced to concurrent sentences of six months' imprisonment and ordered to pay a $2,000 fine. See App., *infra,* 30a, 106a. Meanwhile, Tham was convicted in a separate trial of conspiracy and one count of obstruction of justice. See *United States* v. *Tham,* 960 F.2d 1391 (9th Cir. 1991). Chapman pleaded guilty to the conspiracy charge. See *id.* at 1393 n.1.

3. A divided panel of the Ninth Circuit affirmed in part and reversed in part. App., *infra,* 29a-113a. The result hinged on the adequacy and effect of the knowledge instruction given to the jury, which was derived from the Model Penal Code's definition of knowledge. Judge Hall found the knowledge instruction correct, and would have affirmed the convictions on both counts. *Id.* at 31a-57a. Judge Hug believed that the knowledge instruction was in-

correct, that the error was not harmless as to either count, and that both counts were defective for other reasons as well. He would therefore have reversed the convictions on both counts. App., *infra,* 65a-101a. Judge O'Scannlain agreed with Judge Hug that the knowledge instruction was incorrect, but he viewed that error to be harmless as to the wiretap disclosure count. *Id.* at 102a-113a. Accordingly, the panel affirmed respondent's conviction on the wiretap disclosure count and reversed his conviction on the obstruction of justice count. *Id.* at 30a-31a.

The panel also remanded the case to the district court for resentencing, holding that the district court had failed to provide a reasoned explanation of its downward departure at sentencing. App., *infra,* 30a-31a, 106a-113a.

4. On rehearing en banc, the Ninth Circuit reversed respondent's convictions on both counts. App., *infra,* 1a-28a. The court did not reach the question whether the knowledge instruction was adequate or, if not, whether giving that instruction was harmless error.

With respect to the obstruction of justice count, the court observed that this prosecution was brought under the so-called "omnibus clause" of Section 1503, which makes it an offense to "corruptly or by threats or force, or by any threatening letter or communication, influence[ ], obstruct[ ], or impede[ ], * * * the due administration of justice." 18 U.S.C. 1503. The court held that "the conduct charged in the indictment and found by the jury does not constitute a violation of" that clause. App., *infra,* 16a. In the court's view, Congress had implicitly narrowed the broad language of the omnibus clause when it enacted and later amended another statute, 18 U.S.C. 1512. App., *infra,* 19a-22a.

Specifically, the court observed that attempts to obstruct justice by influencing a witness were originally

covered by Section 1503. In 1982, Congress had removed all references to witnesses when it enacted 18 U.S.C. 1512, a new offense directed toward corruptly influencing witnesses. Then, in 1988, Congress had amended Section 1512 in turn to make clear that it extended not only to coercion of witnesses, but also to non-coercive witness tampering, in which the defendant "corruptly persuades [a witness] * * * or attempts to do so." 18 U.S.C. 1512. The court acknowledged that the 1988 legislation did not alter Section 1503 and that it was enacted five months after the conduct at issue here. App., *infra,* 21a. But the court held that the 1988 legislation nonetheless "indicates that the conduct [claimed to be in violation of Section 1503] must involve a defendant who 'corruptly persuades . . . or attempts to [persuade]' a witness so as to influence his testimony." App., *infra,* 22a. Since respondent was charged with obstructing the grand jury's investigation by making false and misleading statements to the FBI agents, and not by attempting to "corruptly persuade" them to testify falsely before the grand jury, the court concluded that no Section 1503 offense had been charged or proven in this case. App., *infra,* 22a-25a. The court also found support for its conclusion in the rule of lenity, and in the Fifth Amendment concerns that would in its view result from "[c]onstruing section 1503 so broadly as to cover making false and misleading statements to FBI agents." App., *infra,* 24a.

With respect to the wiretap disclosure count, the court held that the statute under which respondent was charged does not prohibit disclosure of wiretaps if the authorization of which the defendant had knowledge had expired at the time the defendant made the disclosure. In the court's view, "[t]he plain language of the statute makes it clear that the purpose of the statute is to prevent interference with 'possible interception.' " App., *infra,* 9a. Although

interference with possible interception could result from disclosure of a pending wiretap application or from disclosure of a still-active authorization, the court stated that "disclosure of an application that already has been denied, or whose authorization already has expired, cannot possibly interfere with 'such interception.' " *Ibid.* In reaching that conclusion, the court added that its analysis of the statute was supported once again by the rule of lenity, App., *infra,* 9a-10a, and by the "substantial" impact on First Amendment interests that it believed could result from interpreting the statute to "bar[ ] disclosure of a wiretap application many months or years after the fact." *Id.* at 11a.

Judge Fernandez, joined by Chief Judge Wallace, dissented from the court's reversal of the conviction on the wiretap disclosure count. In Judge Fernandez's view, the plain language of the statute requires the government to prove only "that [respondent] knew that a wiretap had been applied for; that [respondent] intended to obstruct or impede the interception for which the application was designed to obtain authorization; and that [respondent] gave or attempted to give notice of the possible interception." App., *infra,* 25a. Judge Fernandez explained that, because the evidence was more than adequate to prove those three elements, the conviction for a violation of Section 2232(c) should be affirmed. In Judge Fernandez's view, so long as respondent "attempt[ed] to give a notice that would interfere with a wiretap," the fact that the wiretap of which he had notice had expired was of no relevance. App., *infra,* 26a.

REASONS FOR GRANTING THE PETITION

The court of appeals substantially narrowed the scope of the omnibus clause of 18 U.S.C. 1503, largely in

reliance on an amendment to another statute that was enacted five months after the events in this case. Because the court's unduly narrow reading of Section 1503 directly conflicts with a decision of the Fourth Circuit in a virtually identical factual setting, review is warranted. In addition, although the court of appeals' decision with respect to 18 U.S.C. 2232(c) does not conflict with any decision of any other court of appeals, review of that issue is warranted as well. The court of appeals' decision unjustifiably and dramatically limits the scope of an important federal criminal statute (albeit one that, because individuals entrusted with confidential wiretap information have rarely violated the confidence reposed in them, has generated few prosecutions). In light of the intertwined nature of the two charges at issue in this case and the importance of this prosecution, it would be appropriate for the Court to review both aspects of this case.

1. a. Under the "omnibus clause" of 18 U.S.C. 1503, it is a crime to

> corruptly or by threats or force, or by any threatening letter or communication, influence[ ], obstruct[ ], or impede[ ], or endeavor[ ] to influence, obstruct, or impede, the due administration of justice.

Proof of a violation of the offense defined by that clause requires proof that: "(1) there must be a pending judicial proceeding; (2) the defendant must have knowledge or notice of the pending proceeding; and (3) the defendant must have acted corruptly with the specific intent to obstruct or impede the proceeding in its due administration of justice." *United States* v. *Williams,* 874 F.2d 968, 977 (5th Cir. 1989); see also *United States* v. *Barfield,* 999 F.2d 1520 (11th Cir. 1993); *United States* v. *Biaggi,* 853 F.2d 89, 104 (2d Cir. 1988), cert. denied, 489 U.S. 1052 (1989). Among the proceedings protected by the statute

are grand jury proceedings. See, *e.g.*, *United States* v. *Capo*, 791 F.2d 1054, 1070 (2d Cir. 1986); *United States* v. *Simmons*, 591 F.2d 206 (3d Cir. 1979); *United States* v. *Howard*, 569 F.2d 1331 (5th Cir.), cert. denied, 439 U.S. 834 (1978).

When viewed in the light most favorable to the government (as verdicts of guilty require), the evidence in this case was ample to establish all of those elements. It was undisputed that there was a pending grand jury proceeding at the time of respondent's interview with the FBI agents on June 22, 1988. Moreover, the transcript of that interview was more than sufficient, taken by itself and without regard to other evidence of respondent's knowledge, to establish that respondent knew of the pending proceeding. See pp. 7-8, *supra*. Indeed, respondent testified at trial that, by the end of the interview, he knew that his statements would be reported to the grand jury. 9 Tr. 1359-1361. The court of appeals acknowledged that the jury in this case "found that [respondent], as a target of the investigation, made false and misleading statements to the FBI agents, minimizing his involvement with Chapman and attorney Solomon." App., *infra*, 16a-17a. When committed with the necessary intent, that kind of conduct had been found sufficient in a variety of settings to constitute a corrupt endeavor to obstruct the due administration of justice. See, *e.g.*, *United States* v. *Langella*, 776 F.2d 1078 (2d Cir. 1985) (testifying falsely before grand jury and concealing evidence), cert. denied, 475 U.S. 1019 (1986); *United States* v. *Nelson*, 852 F.2d 706, 711-712 (3d Cir.) (alteration of documents), cert. denied, 488 U.S. 909 (1988); *United States* v. *McComb*, 744 F.2d 555, 559 (7th Cir. 1984) (same); *United States* v. *Faudman*, 640 F.2d 20, 23 (6th Cir. 1981) (same); *United States* v. *Shoup*, 608 F.2d 950, 959-963 (3d Cir. 1979) (submission to U.S. Attorney of misleading report, the contents of which would be given to grand jury); *United States* v. *Griffin*, 589 F.2d 200 (5th Cir.) (false testimony before a grand jury), cert. denied, 444 U.S. 825 (1979); *United States* v. *Walasek*, 527 F.2d 676, 679-680 (3d Cir. 1975) (withholding or destroying documents). But cf. *United States* v. *Essex*, 407 F.2d 214 (6th Cir. 1969) (false statements before grand jury not covered by omnibus clause of Section 1503). See also cases cited pp. 18-20, *infra*.

b. The Ninth Circuit did not dispute the above conclusions. Instead, the court adopted a special requirement for cases in which the defendant is charged with endeavoring to obstruct a grand jury investigation by means of conduct directed toward a prospective grand jury witness.[1] In cases of that sort, the court held, the conduct may be prosecuted under Section 1503 only if it can be characterized as an attempt at "corrupt influence" or "corrupt persuasion" of

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[1] The jury was instructed that it was respondent's effort to obstruct the grand jury investigation through false statements to a prospective witness, not his effort to obstruct an FBI investigation, that was at issue:

> Now, keep in mind, members of the jury, the agents of the Federal Bureau of Investigation they do not work for the grand jury, they're not employees of the grand jury, they're a separate agency and they investigate. You've heard—we had a witness, Mrs. Ellington I believe, describe a little bit about how the grand jury functions.
>
> The thrust of this count is not that he lied to the FBI because that's not a violation of a particular law we're concerned with here. We're concerned with whether or not, whatever was done whether FBI people or not, whether or not he was shown by the evidence by the standard I've mentioned to have known that a grand jury was ongoing and that he endeavored in those interviews, whether the FBI people or not, to in some way impede, interfere with or obstruct the functioning of that grand jury.

10 Tr. 1532-1533.

the witness. App., *infra,* 22a. In the court's view, although "threats, force, bribery, [or] extortion" would satisfy that requirement, *id.* at 23a, "making a false statement to a potential witness" would not. *Id.* at 22a. Applying its freshly minted requirement to the facts of this case, the court found that respondent's endeavor to obstruct and impede the grand jury was not prohibited by the omnibus clause of Section 1503.

The court based the rationale for its decision on what it believed to be congressional intent, as revealed in a series of enactments in the 1980s. Specifically, the court noted that Section 1503 had originally included explicit references to witness tampering, but that all such references had been removed when Congress enacted a statute specifically addressing witness tampering (now codified at 18 U.S.C. 1512) in 1982. App., *infra,* 19a-20a. The court then noted that in 1988—some five months after the conduct at issue in this case—Congress had amended Section 1512 to make clear that it covered "non-coercive" witness tampering. App., *infra,* 20a-21a. The court stated that, in its view, respondent's conduct could not have been charged under the amended Section 1512.[2] App., *infra,* 22a-24a. The court therefore concluded that Congress intended that respondent's conduct not be charged under Section 1503, either. App., *infra,* 23a-24a.

The court's reasoning is erroneous. Throughout the period discussed by the court of appeals, the portion of Section 1503 under which respondent was charged—the omnibus clause—remained unchanged. The logical conclusion to be drawn is that Congress intended to leave the substantive scope of the omnibus clause untouched. To be

[2] That conclusion is in itself highly doubtful, since respondent would certainly appear to have "engage[d] in misleading conduct toward another person, with intent to * * * influence * * * the testimony of any person in an official proceeding." 18 U.S.C. 1512(b)(1).

sure, Congress did undoubtedly create an offense in Section 1512 to address the problem of witness tampering. Respondent, however, was not charged with witness tampering, but with endeavoring to obstruct a grand jury proceeding. The court of appeals' conclusion that his conduct would not have constituted a violation of Section 1512 does not provide any basis for the court's conclusion that his conduct did not violate Section 1503.

Although Congress's enactment and amendment of Section 1512 was the primary basis for the court's construction of Section 1503, the court also briefly appealed to what it viewed as Fifth Amendment concerns that would be raised by "[c]onstruing section 1503 so broadly as to cover making false and misleading statements to FBI agents." App., *infra,* 24a. Had respondent invoked his Fifth Amendment rights and refused to speak with the FBI agents, his conduct would no doubt be constitutionally protected. Although the Fifth Amendment protects an individual's right to remain silent, it does not protect his right to obstruct grand jury proceedings through calculated false statements. See, *e.g., Bryson* v. *United States,* 396 U.S. 64, 72 (1969) ("A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood."); *United States* v. *Rodriguez-Rios,* 14 F.3d 1040, 1049-1050 (5th Cir. 1994) (en banc). Accordingly, the Fifth Amendment privilege provides no basis for the court of appeals' limitation of the scope of Section 1503.

Nor does the rule of lenity, upon which the court of appeals also relied, see App., *infra,* 24a-25a, support its holding in this case. As this Court has repeatedly cautioned, "[t]hat maxim of construction is reserved for cases where, after seizing every thing from which aid can be derived, the Court is left with an ambiguous statute." *Staples* v. *United States,* 114 S. Ct. 1793, 1804 n.17 (1994)

(internal quotation marks and brackets omitted). The broad language of the omnibus clause of Section 1503 leaves no room for ambiguity concerning any issue in this case. Accordingly, the rule of lenity does not apply.

c. The decision of the court of appeals directly conflicts with the Fourth Circuit's decision in *United States* v. *Grubb*, 11 F.3d 426 (1993). In that strikingly similar case, a state court judge who was involved in a scheme to give a government job to a supporter of a political ally was prosecuted for lying to an FBI agent about what he had done. When asked about the events by the agent, the judge made false and misleading statements while denying crucial details of the scheme. See 11 F.3d at 431, 437-438. The judge was prosecuted under Section 1503 for "endeavor[ing] to influence, obstruct and impede the Grand Jury Investigaton * * * by making false and misleading statements to the FBI concerning his involvement" in the matter under investigation. 11 F.3d at 436 n.15. The Fourth Circuit held that, so long as the government proved that the defendant knew of the pending grand jury proceeding and "acted corruptly, that is with the intent to influence, obstruct, or impede that proceeding," he was correctly charged under Section 1503. 11 F.3d at 437.

At the time that the Fourth Circuit decided *Grubb*, the Ninth Circuit had not yet filed its en banc decision in this case. But the Fourth Circuit was well aware of the rationale that the Ninth Circuit employed in this case. For the Fourth Circuit cited Judge Hug's panel opinion in this case and briefly described its reasoning.[3] See 11 F.3d at

[3] The Fourth Circuit cited "*United States* v. *Aguilar*, 994 F.2d 609, 637 (9th Cir.)." Page 637 of the reported panel decision is the first page of Judge Hug's discussion of the obstruction of justice count in this case. See App., *infra*, 92a.

437 n.20. Judge Hug later employed essentially identical reasoning in his opinion for the en banc court with respect to the Section 1503 issue. Compare App., *infra*, 92a-100a (panel opinion) with App., *infra*, 15a-25a (en banc opinion). In addition, the Fourth Circuit noted that, though the two cases were "factually similar," the Ninth Circuit had concluded that no Section 1503 violation had been made out. 11 F.3d at 437 n.20. Yet, although the Fourth Circuit was fully aware of the factual similarity of the cases and the reasoning by which the Ninth Circuit concluded that those facts were insufficient to support a conviction under Section 1503, the Fourth Circuit nonetheless reached the opposite conclusion and upheld the Section 1503 conviction in *Grubb*. This conflict in the circuits concerning the criminality of essentially identical conduct by two sitting judges calls for this Court's review.

Other courts of appeals have also affirmed convictions under Section 1503 for making false statements to FBI agents in an attempt to obstruct a grand jury investigation, although they have not directly addressed the argument upon which the Ninth Circuit based its decision in this case. See, *e.g.*, *United States* v. *Hawkins*, 765 F.2d 1482, 1489 (11th Cir. 1985), cert. denied, 474 U.S. 1103 (1986); *United States* v. *Haldeman*, 559 F.2d 31, 128-129 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977). Cf. *United States* v. *Shoup*, 608 F.2d 950, 962-963 (3d Cir. 1979) (submission of false and misleading report to U.S. Attorney with knowledge that information in it would be provided to the grand jury). Those decisions are inconsistent on their facts with the Ninth Circuit's decision in this case.[4]

[4] Other courts have affirmed Section 1503 convictions in other contexts based on unsworn false statements. See, *e.g.*, *United States* v. *Barfield*, 999 F.2d 1520, 1524 (11th Cir. 1993); *United States* v. *Barber*, 881 F.2d 345, 351 (7th Cir. 1989), cert. denied, 495 U.S. 922 (1990).

Although one other court has held that a Section 1503 violation based on unsworn false statements to an FBI agent could not be made out, that court appears to have based its decision on the specific facts of the case and not to have generally curtailed the scope of Section 1503 as did the Ninth Circuit here. In *United States* v. *Wood,* 6 F.3d 692 (10th Cir. 1993), the defendant made false statements to FBI agents who were assisting in a grand jury investigation; the statements concerned the circumstances under which he loaned an automobile to an official who was suspected of political corruption. The Tenth Circuit held that the defendant's conduct did not violate Section 1503, because the agents "would not expect a full confession in the context of an unsworn interview" and the defendant's self-serving false statements did not have "the natural and probable effect of impeding the grand jury investigation." 6 F.3d at 696.

The Ninth Circuit did not purport to rely on *Wood* in its decision in this case and, as we read it, the Tenth Circuit's decision in *Wood* lends no support to the Ninth Circuit's result. Unlike the Ninth Circuit in this case, the Tenth Circuit in *Wood* did not adopt a general rule that would preclude all Section 1503 prosecutions based on unsworn false statements to potential grand jury witnesses. Instead, the Tenth Circuit simply relied on its analysis of the facts of the case before it, which revealed that, in the Tenth Circuit's view, the particular false statements at issue would be unlikely to have the effect of impeding an investigation. The Ninth Circuit did not rely on any such conclusion about the facts of this case, and the evidence in this case would not support a reversal based on that theory.

2. The Ninth Circuit also adopted a seriously erroneous interpretation of 18 U.S.C. 2232(c), the wiretap disclosure statute. That statute provides in relevant part:

> Whoever, having knowledge that a Federal investigative or law enforcement officer has been authorized or has applied for authorization under chapter 119 [of Title 18] to intercept a wire, oral, or electronic communication, in order to obstruct, impede, or prevent such interception, gives notice or attempts to give notice of the possible interception to any person shall be fined under [Title 18] or imprisoned not more than five years, or both.

The plain language of the statute requires proof that (1) the defendant knew that a federal officer had been authorized to intercept a wire communication or had applied for authorization; (2) the defendant intended to obstruct, impede, or prevent the interception for which authorization had been given or application had been made; and (3) the defendant gave notice or attempted to give notice of the possible interception.

The evidence in this case was sufficient to establish those elements. Judge Peckham testified that, because he "feared that Chapman might be going to use the [respondent's] prestige of his office in the furtherance of Chapman's interest," 7 Tr. 922, he informed respondent "that in the course of a wiretap application that the name Abie Chapman had come up." 7 Tr. 921. Respondent took action based on that knowledge several months later, when he saw Chapman being photographed leaving respondent's home. As he later explained to Solomon, he "knew" the FBI was wiretapping Chapman because Peckham had told him. Resp. C.A. Excerpts of Rec. 6. And respondent admitted to Solomon that he "told [his] nephew" and said to the nephew "I want you to tell him [Chapman] not over the phone," but to "get to his house and tell him." *Id.* at 18. As the dissenting opinion remarked, "[i]t cannot be doubted that [respondent] conveyed information to Chapman with the intent to impede interception." App., *infra,* 26a.

In ruling that respondent's conduct did not violate Section 2232(c), the court of appeals interpreted the statute to require proof that the precise application or authorization of which the defendant had knowledge was still pending or unexpired at the time the defendant made the disclosure. The court reasoned that "[t]he plain language of the statute makes it clear that the purpose of the statute is to prevent interference with 'possible interception,' " and that no such interference is possible where the application "has been denied" or the authorization "already has expired." App., *infra*, 9a. In those circumstances, the court held, Section 2232(c) imposes no limit on the defendant's disclosure of wiretap information—even if (as here) the defendant believes that the wiretap is in effect at the time he makes the disclosure and a reauthorized wiretap is in fact in effect.

The effect of the court of appeals' opinion is to impose an unjustified and arbitrary limit of 30 days or less on the protection afforded by Section 2232(c). Under 18 U.S.C. 2518(5), wiretaps may be authorized or extended for a maximum period of 30 days, and the government is obligated to minimize its interception of wire communications. See 18 U.S.C. 2518(5). Accordingly, it is quite common for wiretaps to be authorized, extended, terminated, and re-authorized in the context of overlapping or continuing criminal investigations.[5] Under the court of appeals' decision, an individual who, for example, obtains knowledge of a particular authorization toward the end of the 30-day period and discloses it to a target of the interception after the 30-day period has expired in an effort to prevent the interception would be immune from prosecution. Even an

[5] The wiretap at issue in this case was authorized, terminated, reauthorized, terminated again, reauthorized again, and then extended for a period of months. See App., *infra*, 5a.

individual who obtained knowledge of the authorization at its inception could disclose it to the targets without fear of prosecution so long as he waited 30 days to do so.

The court of appeals' construction is neither required by the statutory language nor suggested by Congress's purpose in enacting the statute. The plain language of the statute requires proof of two mental elements and one physical act in order to prove a violation. The mental elements are knowledge of an application or authorization, and intent to obstruct the interception that would result from that application or authorization. The physical act is the defendant's giving notice or attempting to give notice of the possible interception. Nothing in the statute requires proof that the defendant be shown to have succeeded in obstructing the interception of a wire communication, and there is no basis in the statutory language for the court of appeals' requirement that such obstruction be possible at the time the disclosure was made.

When it enacted the statute, Congress understood it to prohibit disclosures of applications or authorizations, regardless of whether they were pending, in operation, or expired at the time of the disclosure. The Senate committee report stated in entirely general terms that the provision "makes it a criminal act * * * to warn any person that a Federal agency or law enforcement officer has been authorized or has sought authorization * * * to intercept a wire, oral, or electronic communication." S. Rep. No. 541, 99th Cong., 2d Sess. 34 (1986). The committee then recited the "elements" of the offense much as we listed them above. *Ibid.* Significantly, among those were that "[t]he defendant must engage in conduct of giving notice of the possible interception to any person who *was or is* the target of the interception." *Ibid.* (emphasis added). That language makes clear that Congress understood that disclosure of wiretap information even to an individual

who is no longer a target of the tap is prohibited. The report also stated that "[t]he offense also includes an attempt to engage in the offense," *ibid.*, indicating that the fact that the disclosure did not or could not have actually interfered with the interception is of no consequence. The House committee report included substantially identical language. H.R. Rep. No. 647, 99th Cong., 2d Sess. 60-61 (1986).

The court of appeals suggested that the rule of lenity and First Amendment considerations support its limiting interpretation. See App., *infra,* 9a-10a, 11a-12a. As with the obstruction statute, however, resort to the rule of lenity is inappropriate because the language and the intent of Section 2232(c) are unambiguous. Nor does the construction of the statute we advocate raise a substantial First Amendment concern. Under any construction, the statute limits some disclosure of information that could be of public interest. But the statute only prohibits disclosures made with the intent to impede or obstruct a possible interception. Where the disclosure is not made with that intent—*e.g.*, where the intent is "to correct past government misconduct and to avert similar abuses of power in the future," by disclosing "politically-motivated wiretaps, such as those that occurred at the height of the civil rights movement," App., *infra,* 11a-12a—the defendant could not be prosecuted under Section 2232(c). Moreover, it has long been settled that the government may prohibit individuals in a position of confidence, such as respondent, from disclosing confidential information that they receive in their official capacity. See, *e.g.*, *Snepp* v. *United States,* 444 U.S. 507, 511 & n.6 (1980) (per curiam). Indeed, the grand jury secrecy requirement of Fed. R. Crim. P. 6(e) is based on essentially the same rationale as Section 2232(c), and it is enforceable through a criminal contempt sanction or, in an appropriate case, a prosecution for obstruction

of justice. See, *e.g.*, *United States* v. *Jeter,* 775 F.2d 670, 677-678 (6th Cir. 1985), cert. denied, 475 U.S. 1142 (1986) (rejecting argument that First Amendment provides defense to charge of obstructing justice by violating Rule 6(e)); *United States* v. *Howard,* 569 F.2d 1331, 1336 (5th Cir.), cert. denied, 439 U.S. 834 (1978).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1994

APPENDIX A

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

Nos. 90-10597, 91-10024

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE-CROSS-APPELLANT

v.

ROBERT P. AGUILAR,
DEFENDANT-APPELLANT-CROSS-APPELLEE

Appeal from the United States District Court
for the Northern District of California

Argued and Submitted Nov. 18, 1993
Decided April 19, 1994

Before: WALLACE, Chief Judge, HUG, TANG, FARRIS, PREGERSON, NORRIS, REINHARDT, BRUNETTI, KOZINSKI, LEAVY, and FERNANDEZ, Circuit Judges.

HUG, Circuit Judge:

I.

OVERVIEW

The appellant, United States District Judge Robert Aguilar, was charged with five criminal violations. Trial was held on August 1, 1990. He was acquitted of three of the charges, and convicted of two. The convictions were for illegally disclosing a wiretap in violation of 18 U.S.C. § 2232(c), and endeavoring to obstruct justice in violation of 18 U.S.C. § 1503. The appellant was sentenced to two six-month terms of imprisonment, to be served concurrently, and fined $2,000. Judge Aguilar appeals his convictions on both counts, and the Government appeals his sentence.

The central question in this case is whether Judge Aguilar's conduct, as charged in the indictment and found by the jury, violated the criminal statutes on which his convictions are based. We find that the statutes do not apply to the conduct at issue in this appeal, and we therefore reverse the convictions.[1]

II.

BACKGROUND

The genesis of the charges against Judge Aguilar was an effort by Rudy Tham, Abraham Chapman, and Edward Solomon to have Tham's 1980 conviction for embezzlement set aside.

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[1] Judge Aguilar challenges his convictions on other grounds besides the inapplicability of the statutes. He asserts that the evidence was insufficient to prove that he satisfied the knowledge requirement of either statute, and that the definition of knowledge contained in the jury instructions was erroneous. Since we reverse his convictions because the statutes do not apply to the conduct found by the jury, we have no need to reach the other issues.

Tham was a former union official for San Francisco Teamsters Local 856. He had been an active leader of Local 856 until his conviction on May 21, 1980, for embezzlement and making false entries into union records. District Judge Stanley A. Weigel presided over the trial. Tham desired to have his conviction overturned so that he could resume his union activity. In this regard, Tham sought the assistance of attorney Edward Solomon, and a friend, Abraham Chapman.

Solomon is an attorney whose office was located in the same building as Local 856. Twenty to thirty percent of Solomon's work came from referrals by Tham. Solomon had attended Hastings College of the Law with Judge Aguilar and was an acquaintance of the Judge.

Chapman, an 83 year-old man, was married to Mrs. Josephine Knaack ("Mrs. Knaack"), a longtime friend of the Aguilar family, whose daughter, Marilyn, had married Judge Aguilar's brother. Judge Aguilar had met Chapman at several family functions.

Solomon began working on setting aside Tham's conviction in 1987. He advised Tham that the best way to get his conviction overturned would be by filing a petition for habeas corpus under 28 U.S.C. § 2255. The petition was filed and scheduled to be heard by Judge Weigel. In an effort to enhance the chances for success, Tham, Solomon, and Chapman sought to utilize Chapman's and Solomon's ties to Judge Aguilar to solicit help and advice from Judge Aguilar. They hoped to have Judge Aguilar influence Judge Weigel in his decision on Tham's petition.

Chapman arranged a meeting between Judge Aguilar and Solomon on September 12, 1987. At the meeting, Judge Aguilar reviewed the petition and advised Solomon to seek an evidentiary hearing. After this meeting, Solomon and Chapman, at the urging of Tham, periodically called Judge Aguilar, asking him to check on the

scheduling and status of the petition and the hearing. Judge Aguilar complied with the request and twice checked the court calendar to see if the hearing had been set, and once asked Judge Weigel if a hearing had been set. It is within this framework that Judge Aguilar became intertwined with Tham, Chapman, and Solomon.

In the course of investigating Tham and Chapman on unrelated matters, the FBI became aware of Tham's efforts regarding his habeas petition, and the conversations Chapman and Solomon had with Judge Aguilar. The FBI began an investigation into the events regarding Tham's habeas petition and the possible illegal attempt to influence Judge Weigel.

This investigation led to several charges being presented to the grand jury against Tham, Chapman, and Judge Aguilar, and on June 13, 1989, they were indicted.[2] In the initial trial, the three persons were tried together. This ended in a hung jury and a consequent mistrial.

Judge Aguilar was then tried separately on five counts. The charge that was the principal focus of the trial was that Judge Aguilar had participated in a conspiracy to impede criminal investigations and to influence Judge Weigel in his decisions concerning Tham's section 2255 petition. Judge Aguilar testified that he was only advising Solomon and Chapman as to how to get the matter before the court procedurally. Judge Weigel testified that Judge Aguilar did not in any way attempt to influence him in his ruling on Tham's section 2255 petition. Judge Aguilar was acquitted of the conspiracy charge and on two other charges. The jury found Judge Aguilar guilty on the two remaining charges.

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[2] In exchange for his cooperation with the Government, Solomon was not prosecuted.

Judge Aguilar was convicted on a charge of disclosing a wiretap application and a charge of attempting to obstruct justice. The nexus of these charges stems from specific incidents that occurred during the investigation relating to Tham's petition. We now turn to an analysis of the specific charges of which Judge Aguilar was convicted, and the facts involved in those charges.

III.

WIRETAP CHARGE

A. *Facts*

The events that led to the charge of illegal disclosure of a wiretap application are as follows.

Throughout the time that Tham was attempting to have his conviction set aside he was being investigated by the FBI as a part of a nationwide probe into health care provider fraud. On April 12, 1987, the FBI applied to then-Chief United States District Judge Robert Peckham for authorization to conduct electronic surveillance of Tham's business telephones. The application named Chapman as a potential interceptee of the wiretap.

On April 20, 1987, Judge Peckham signed an order authorizing the wiretap. The wiretap expired on May 20, 1987, and on May 21, Judge Peckham signed an order terminating the wiretap. The April 20 wiretap was never extended. Other wiretaps were authorized for which Chapman was an interceptee from September 11 to October 12, 1987, and from October 22, 1987, which was extended through May 8, 1988, by applications pursuant to 18 U.S.C. § 2518(5).

During this time, the Department of Justice of the State of California was conducting surveillance of Chapman on unrelated matters. On July 9, 1987, a state agent photo-

graphed Chapman walking out of the San Jose Federal Building with Judge Aguilar. The state agent notified the FBI. The FBI and the state agent then observed Judge Aguilar and Chapman eating lunch together.

As Chief Judge of the Northern District of California, Judge Peckham had an interest in maintaining the integrity of the court and in being informed of any matter which could damage the court's reputation. He had an arrangement with the FBI Special Agent in Charge that the agent would report to Judge Peckham any perceived improprieties occurring within the Northern District Court. Thus, on August 5, 1987, FBI Special Agent in Charge, Richard Held, informed Judge Peckham that in the course of investigating Abe Chapman, Judge Aguilar had been observed in the company of Abe Chapman. The agent informed Judge Peckham that there was no indication that Judge Aguilar was implicated in any criminal activity, or that Judge Aguilar was a subject of the investigation.

On August 9, Judge Peckham ran into Judge Aguilar at an American Bar Association reception in San Francisco. The two discussed the San Jose court calendar. Judge Peckham then told Judge Aguilar that, "in the course of a wiretap application that the name Abie Chapman had come up and that [when he] had been a United States Attorney in 1951 that Abie Chapman had been prosecuted in a notorious drug case." Judge Peckham did not tell Judge Aguilar whose phone was to be tapped or whether Chapman was a person whose messages were to be intercepted. Judge Peckham testified that his intent in telling this information to Judge Aguilar was to let Judge Aguilar know that associating with Chapman could create the appearance of impropriety. Judge Aguilar responded that he knew the old man, and laughed because the Abe Chapman he knew was "a senile little old man who waddled when he walked."

Judge Aguilar and Judge Peckham did not discuss Chapman or any wiretap after August 9.

Judge Aguilar testified that on February 6, 1988, Abe Chapman stopped by his house to drop off a box of sausage on behalf of Mrs. Knaack. Chapman stayed for about 10 minutes and had two brandies. Judge Aguilar walked Chapman to his car. At the car, Judge Aguilar noticed across the street a man who appeared to be conducting surveillance and taking pictures of him and Chapman. Judge Aguilar suspected the man was with the police or the FBI. Chapman then drove off almost causing an accident with two cars, one that came to a screeching halt and one that drove over the curb to miss Chapman. The car conducting surveillance followed Chapman.

The incident caused Judge Aguilar a good deal of concern. He then called his nephew, Steve Aguilar, and asked him to come over. Judge Aguilar knew that Chapman was next going to Steve's mother's house to make a delivery. He told Steve of his concerns about Chapman's driving and stated that he had heard as a fluke at work that phones were being tapped. He asked Steve to go to his mother's house and personally tell Chapman about his concerns and not to come around or call him any more. Steve went to his mother's house and conveyed the message to Chapman in person, and stated that Judge Aguilar had mentioned that Chapman's phone might be tapped. Judge Aguilar was mistaken in his belief that Chapman's phone was tapped. There was no evidence of there ever having been an application or an order authorizing a wiretap on Chapman's phone.

It is from the events of February 6, 1988, that Judge Aguilar was charged and convicted of improperly disclosing a wiretap pursuant to 18 U.S.C. § 2232(c). For the following reasons, we hold that these facts do not constitute an offense under section 2232(c).

B. *The Scope of 18 U.S.C. § 2232(c)*

Judge Aguilar was convicted of Count VI, which charged the following:

> On or about February 6, 1988, in the Northern District of California, defendant, Robert P. Aguilar while a United States District Judge, having knowledge that a Federal investigative officer had applied to the United States District Court for the Northern District of California for authorization to intercept wire communications of Abe Chapman, and in order to obstruct, impede, and prevent such interception, gave notice and attempted to give notice of the possible interception to Abe Chapman. In violation of Title 18, United States Code, Section 2232(c).

Section 2232(c) provides in part:

> *Notice of Certain Electronic Surveillance.* – Whoever, having knowledge that a Federal investigative or law enforcement officer has been authorized or has applied for authorization under chapter 119 to intercept a wire, oral, or electronic communication, in order to obstruct, impede, or prevent *such interception*, gives notice or attempts to give notice of the possible interception to any person shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 2232(c) (emphasis added).

This language requires a pending application for authorization or an authorization that has not expired. The Government argues that, under section 2232(c), it is sufficient if, at some time in the past, there was a wiretap application; it does not matter, under the Government's theory, if the wiretap application has already been denied or if authorization has been granted but has already expired. This is not a reasonable construction of the statute.

The plain language of the statute makes it clear that the purpose of the statute is to prevent interference with "possible interception." It is possible that disclosure of an existing wiretap can lead to interference with interception. It also is possible that disclosure of a pending wiretap application, if the application is subsequently authorized, can lead to interference with interception. However, disclosure of an application that already has been denied, or whose authorization already has expired, cannot possibly interfere with "such interception." The language, "such interception," shows that the statute pertains to the particular application or authorization of which the defendant has knowledge. The defendant must intend to impede an interception from the specific application or authorization of which he has knowledge.

Section 2232(c), read with the language essential to this charge, is as follows:

> Whoever having knowledge that a Federal . . . officer . . . has applied for . . . authorization . . . to intercept a wire . . . communication in order to obstruct . . . *such interception* gives notice or attempts to give notice of the possible interception to any person shall be fined . . . or imprisoned. . . .

(emphasis added.)

The statutory language is directed to disclosure of a wiretap that could possibly result from the application of which the defendant has knowledge – not from some later application, which would require a completely new justification under 18 U.S.C. § 2518(5). At the very least, this is a reasonable construction of the statute. We conclude that the Government's construction is an unwarranted expansion of the statutory language, and one which ignores the crucial phrase "such interception." However, even if the Government's interpretation were possible because of some ambiguity, the more lenient construction is required.

To reject a reasonable construction of a statute is incompatible with the rule of lenity. "In interpreting the substantive ambit of criminal prohibitions, ambiguities must be resolved in favor of the criminal defendant." *United States v. Baxley*, 982 F.2d 1265, 1270 (9th Cir.1992); *see United States v. Batchelder*, 442 U.S. 114, 121, 99 S.Ct. 2198, 2202, 60 L.Ed.2d 755 (1979); *Simpson v. United States*, 435 U.S. 6, 14, 98 S.Ct. 909, 914, 55 L.Ed.2d 70 (1978). The plain language of the statute is clear, but even if it were possible to arrive at the Government's construction out of some ambiguity in the statute, it would violate the rule of lenity to do so.

Furthermore, there is no indication that the statute's primary concern is with the giving of notice with specific intent to interfere with surveillance in general, as the Government contends. The statute does not impose liability on a defendant who interferes with "any future surveillance" or "any future wiretap." Rather, it imposes liabilty on a defendant who has knowledge of a particular wiretap application or authorization and who gives another person notice of *"the possible* interception" in an effort to obstruct *"such* interception." See 18 U.S.C. § 2232(c). The Government's interpretation that the statute applies to interference with future surveillance does not accord with the plain language of the statute.

The Government relies on an isolated phrase in a Senate Committee Report to construe the statute as applying to applications for wiretaps that have expired. In interpreting a federal statute, we seek to determine the intent of Congress. The primary indication of that intent is the language of the statute. It is only if the language is unclear that we refer to legislative history as an aid to the statutory interpretation. *Blum v. Stenson*, 465 U.S. 886, 896, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984); *United States v. Koyomejian*, 970 F.2d 536, 543 (9th Cir.) (Kozinski, J.,

concurring), *cert. denied*, ____ U.S. ____, 113 S.Ct. 617, 121 L.Ed.2d 550 (1992); *Haynes v. United States*, 891 F.2d 235, 238 (9th CIr.1989). In this case, we conclude that the language of the statute clearly expresses the congressional intent. Furthermore. the language of the statute is consistent with the purpose of the Electronic Communications Act, as expressed in the Senate Report, which is "to protect against the unauthorized interception of electronic communications," so as to further "guard against the arbitrary use of Government power to maintain surveillance over citizens. . . ." S.Rep. No. 541, 99th Cong., 1st Sess. 1, (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555. (Volume 5.)

First Amendment considerations also militate against the Government's construction of section 2232(c). Statutes must be construed, if fairly possible, to avoid constitutional problems. *See Communications Workers of America v. Beck*, 487 U.S. 735, 762, 108 S.Ct. 2641, 2657, 101 L.Ed.2d 634 (1988); *United States ex rel. Madden v. General Dynamics*, 4 F.3d 827, 830 (9th Cir. 1993). According to the Government, section 2232(c) bars the disclosure of wiretap applications for an indefinite period of time. However, it is unlikely that the Government would be able to assert the necessary compelling interest[3] in barring disclosure of a wiretap application many months or years after the fact, since the possibility that such disclosure would lead to the obstruction of an existing wiretap is extremely slim. Moreover, the impact on First Amendment interests could be substantial. The suppression for an indefinite period of information regarding politically-motivated wiretaps, such as those that occurred at the height of the civil rights movement, could not only

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[3] *See Sable Communication of California, Inc. v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836, 106 L.Ed.2d 93 (1989).

impede free speech but could obstruct efforts to correct past government misconduct and to avert similar abuses of power in the future. Our concern that section 2232(c), as construed by the Government, might reach a "substantial amount of constitutionally protected conduct" thus reinforces our more limited interpretation of the statute. *See United States v. Hutson*, 843 F.2d 1232, 1234 (9th Cir.1988) (setting out test for First Amendment overbreadth challenge) (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, 102 S.Ct. 1186, 1991, 71 L.Ed.2d 362 (1982)).

The Government argues that the existence of a wiretap or pending application is unnecessary because the statute criminalizes attempts. Thus, the Government maintains, an attempt to obstruct the interception of a wire communication is sufficient for a conviction, as long as the defendant knows of a wiretap application or authorization and discloses it, whether or not such an application or authorization in fact still exists at the time of disclosure.

Section 2232(c) is not a classic attempt statute. The classic attempt statute criminalizes an attempt to violate *another* statute or *another* statutory subsection. *See, e.g.*, 18 U.S.C. § 1113 (1988) (criminalizating an attempt to commit murder or manslaughter; murder criminalized by 18 U.S.C. § 1111 (1988) and manslaughter criminalized by 18 U.S.C. § 1112 (1988)); 18 U.S.C. § 1201(d) (1988) (criminalizing an attempt to violate 18 U.S.C. §1201(a)(4) (1988), which prohibits the kidnapping of foreign officials). There is not a statute that criminalizes attempts to violate section 2232(c), and section 2232(c) does not criminalize an attempt to violate another statute or statutory subsection.

Section 2232(c) itself punishes someone who "gives notice *or attempts* to give notice" of possible interception (emphasis added). A reading of the statute demonstrates

that the word "attempt" modifies only the words "to give notice." There is no modification of the requirement of a possible interception. In order for a statutory violation to occur under section 2232(c), the element of "possible interception" must be met. Thus, the wiretap must be in existence or there must be a pending application or authorization. As we have discussed, actually giving notice of an expired wiretap authorization or application is not a violation of section 2232(c); *a fortiori* an *attempt* to give notice of an expired authorization or application cannot be a violation of the statute. Thus, the attempt aspect of the statute is not involved in this case. The issue in this case is not whether Judge Aguilar attempted to disclose prohibited wiretap information, but whether the wiretap information he did disclose was prohibited.

The Government relies on *United States v. Russell*, 255 U.S. 138, 41 S.Ct. 260, 65 L.Ed. 553 (1921), and *United States v. Zemek*, 634 F.2d 1159 (9th Cir.1980), *cert. denied*, 450 U.S. 916, 101 S.Ct. 1359, 67 L.Ed.2d 341 (1981), to support its argument that § 2232(c) bars the attempted disclosure of an expired wiretap. The statute at issue in *Russell* criminalized improperly influencing or endeavoring to influence "any . . . juror." 255 U.S. at 140, 41 S.Ct. at 260. Although the indictment did not state that the person whom the defendant approached had actually been selected to be a juror, the court ruled the omission immaterial. *Id.* at 143, 41 S.Ct. at 261. It held that a person who has been summoned for jury service at the defendant's trial but has not yet been selected or sworn *is* a "juror" for purposes of the statutory provision involved. In *Zemek*, where the statute covered obstructing or endeavoring to obstruct the communication of information to a criminal investigat*or*, we found it irrelevant that the criminal investigat*ion* had already terminated. 634 F.2d at 1176-77. We held that the statute did not provide

that an investigation must be in progress, only that the defendant must have obstructed or attempted to obstruct communications to an investigat*or*. We then found that the proof necessary to satisfy the statutory requirement that the intended recipient of the communication be an "investigator" was unchallenged. *Id.* at 1177 n. 22. *Russell* and *Zemek* are distinguishable from this case.

The critical difference between *Russell* and *Zemek*, on the one hand, and the case before us, on the other, is evident. In both of the earlier cases, the obstruction related to an entity that *actually existed* at the time of defendant's criminal action—in *Russell*, the court found that there was a "juror" *in esse*, in *Zemek*, the court held that there was an actual "investigator." Here, the Government urges an entirely opposite theory: that the statute is violated by the attempted disclosure of an entity that *does not exist*, i.e., a wiretap that has *expired*.

The dissent argues that it is irrelevant whether interception was objectively possible or not, in short, that factual impossibility is not a defense. The present case, however, involves not just factual impossibility, but legal impossibility. It is the latter which is dispositive here. The doctrine of legal impossibility has been a part of criminal law for centuries. *See R. v. Carr*, 168 Eng. Rep. 854 (1819) (defendant acquitted on grounds of legal impossibility). Where legal impossibility exists, there can be no violation of a statute. An example of legal impossibility may be seen if we change one basic fact in *Russell*. Specifically, in *Russell*, had there been no trial contemplated at all, and thus no possible jurors to attempt to influence, it would have been legally impossible for the defendant to have committed a statutory violation. Similarly, no matter what "concrete action" a defendant may take, if no wiretap exists or is currently authorized and if there is no pending application, there is no way that the defendant can obstruct

or attempt to obstruct the possible interception of a wiretap. In short, in the case before us, because the wiretap had expired at the time Judge Aguilar acted, no violation of section 2232(c) occurred.

The fact that other wiretaps were subsequently authorized on the telephones of a number of individuals, including the individual whose phone had been tapped under the April 20 authorization, cannot save the Government's case. The statute prohibits disclosure of a wiretap of which a defendant has knowledge.[4] The only application about which Judge Aguilar had any knowledge was the application mentioned by Judge Peckham. This application had resulted in the authorization to tap Rudy Tham's telephone and had expired by the time Judge Peckham spoke to Judge Aguilar. Therefore, there was no possibility that Judge Aguilar by any notification could have impeded an interception authorized as a result of that application.

For the above reasons, we conclude that the record in this case fails to establish that Judge Aguilar violated 18 U.S.C. § 2232(c).

IV.

OBSTRUCTION OF JUSTICE CHARGE

Judge Aguilar was convicted on Count Eight of the indictment, which stated:

1. At all times relevant to this count of the indictment, defendant AGUILAR was aware that a federal grand jury in the Northern District of California was investigating possible violations of federal criminal law by ROBERT P. AGUILAR, Abe Chapman, Michael Rudy Tham, and others.

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[4] Under the statute, knowledge of an application for or authorization of the wiretap satisfies the scienter requirement.

2. On or about June 22, 1988, defendant ROBERT P. AGUILAR, while a United States District Judge, did corruptly endeaver to influence, obstruct, and impede the aforementioned grand jury investigation, and thus the due administration of justice in the Northern District of California, by making false and misleading statements to Special Agents of the Federal Bureau of Investigation concerning defendant AGUILAR's assistance to Michael Rudy Tham and concerning defendant AGUILAR's knowledge and disclosure of information concerning court-ordered electronic surveillance of Abe Chapman.

In violation of Title 18, United States Code, Section 1503.

A. *Facts*

The facts that led to the obstruction of justice charge are as follows.

In the course of the FBI investigation of the possible attempt to influence Judge Weigel in ruling on Tham's petition, the FBI agents decided to interview Judge Aguilar to determine the extent of his involvement in the matter.

They asked Judge Aguilar questions about his involvement with Chapman and Solomon concerning Tham's petition, and about his knowledge of a wiretap and what he told Chapman. The jury found that some of his responses were false and misleading.

B. *The Scope of 18 U.S.C. § 1503*

We reverse the conviction of endeavoring to obstruct justice because the conduct charged in the indictment and found by the jury does not constitute a violation of section 1503. The jury found that Judge Aguilar, as a target of the investigation, made false and misleading statements to the FBI agents, minimizing his involvement with Chapman

and attorney Solomon. Conduct of this nature is governed not by section 1503 but by 18 U.S.C. § 1001 (1988), which concerns false statements to federal agencies. Judge Aguilar was not charged with a violation of section 1001. Furthermore, even under a section 1001 charge, the statute does not apply to certain situations where a truthful response would have incriminated the declarant. This is known as the "exculpatory no" doctrine. We explained the application of section 1001 and the "exculpatory no" doctrine in *United States v. Equihua-Juarez,* 851 F.2d 1222, 1224 (9th Cir.1988).

In the case before us, Judge Aguilar is charged with obstructing justice under section 1503, which provides:

3. Influencing or injuring officer or juror generally

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injuries any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, *or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice,* shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1503 (emphasis added). The underscored part of this statute is often referred to as the "omnibus clause," and it is the part of the statute that Judge Aguilar is alleged to have violated.

This statute requires the obstruction of a judicial proceeding, not simply an FBI investigation. The judicial proceeding he is charged with obstructing is a grand jury investigation of a conspiracy involving himself and others. There is no evidence that Judge Aguilar coerced, intimidated or attempted to persuade the FBI agents to testify falsely before the grand jury. Instead, at trial the jury found that he misled the FBI about the extent of his contacts with Chapman and Solomon. This does not constitute the crime of obstructing justice under section 1503.

We have interpreted section 1503 as extending only to interference with a pending judicial proceeding. *United States v. Brown,* 688 F.2d 596, 598 (9th Cir.1982). Interference with a government agency's investigation is insufficient. *Id.* There is no evidence that a grand jury had authorized or directed the FBI investigation; nor is there evidence that the FBI agents had been subpoenaed to testify. The conduct alleged was interference with an FBI investigation, not a judicial proceeding. The fact that the FBI investigation could result in producing evidence that might be presented to a grand jury is insufficient to constitute a violation of section 1503.

To construe the statute as the Government has in this case would mean that anyone who makes a false statement to any person who might be or is expected to be a witness before a grand jury or any other judicial proceeding about a subject under investigation could be guilty of the crime of obstructing justice. Other statutory sections safeguard against misinformation to a grand jury. False testimony before a grand jury is punishable as perjury. Causing a witness knowingly to testify falsely is suborning perjury. This obstruction of justice statute was not intended to extend to the facts of this case.

In analyzing Congress's intended application of section 1503, a brief history of the section is enlightening. Section 1503, as it was originally enacted in 1948, specifically proscribed certain conduct seeking to influence witnesses, as well as judicial officers and jurors, in judicial proceedings. The title of the section, as well as the body, indicated that the statute was intended to cover judicial officers, jurors, and witnesses. The full text of the statute is set forth in the margin.[5] In 1982, Congress enacted the Victim and Witness Protection Act, 96 Stat. 1248 (1982). This new statute removed all references to witnesses in section 1503 and enacted a new section 1512, addressed specifically to the influencing of witnesses, victims, and informants. The

[5] **§ 1503. INFLUENCING OR INJURING OFFICER, JUROR OR WITNESS GENERALLY**

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

62 Stat. 769 (1948).

Second Circuit in *United States v. Hernandez,* 730 F.2d 895, 899 (2d Cir. 1984), stated in its conclusion that section 1512 replaced that part of section 1503 that pertained to witnesses. The *Hernandez* case involved a threat to kill a witness, and the court held that the charge could not be sustained under section 1503. *Id.*

Our court faced a charge of witness tampering under somewhat difference circumstances in *United States v. Lester,* 749 F.2d 1288 (9th Cir. 1984). The facts in the *Lester* case involved the hiding and bribing of a witness in order to prevent him from testifying in a criminal trial. We disagreed with the broad statement of the Second Circuit in the *Hernandez* case that "[C]ongress affirmatively intended to remove witnesses entirely from the scope of § 1503." *Id.* at 1295 (internal quotation omitted). We distinguished *Hernandez,* noting that it dealt with intimidation and harassment of a witness, whereas *Lester* involved non-coercive witness tampering. We observed that section 1512 did not encompass such non-coercive conduct and, thus, concluded that this conduct still remained punishable under the omnibus clause of section 1503. *Id.* at 1295-96.

In 1986, the Second Circuit dispelled any doubts about what was meant by the *Hernandez* opinion, stating that section 1512 was intended to completely supplant the portion of section 1503 that dealt with witnesses. *United States v. Jackson,* 805 F.2d 457, 461 (2d Cir. 1986), *cert. denied,* 480 U.S. 922, 107 S.Ct. 1384, 94 L.Ed.2d 698 (1987). This presented a clear conflict with our *Lester* case.

In 1988, Congress obviated this conflict between the Ninth and Second Circuits by amending section 1512 to cover specifically non-coercive witness tampering. This eliminated the problem that we discussed in *Lester.*[6]

[6] The Second Circuit in *United States v. Masterpol,* 940 F.2d 760, 763 (2d Cir. 1991), observed that the 1988 amendments "diminished significantly" the force of the *Lester* precedent. Perhaps, more fundamentally, it could be stated that the problem we saw in *Lester* was alleviated by Congress.

Section 1512, as it read at the time of our decision in *Lester,* was limited to witness tampering by a person who accomplished it or attempted to accomplish it through intimidation, physical force, threats or misleading conduct. This left non-coercive witness tampering untouched unless it could be classified as "misleading conduct." The 1988 amendment to section 1512 inserted the phrase "or corruptly persuades" within the proscribed conduct, thus providing for non-coercive witness tampering. The pertinent part of section 1512 as amended is as follows:

> (b) Whoever knowingly uses intimidation or physical force, threatens, *or corruptly persuades* another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—
>
> (1) influence, delay, or prevent the testimony of any person in an official proceeding;
>
> . . . .
>
> shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

This amendment was adopted November 18, 1988, approximately five months after the conduct forming the basis for the charge against Judge Aguilar occurred. Thus, in our circuit, under the authority of the *Lester* opinion, non-coercive witness tampering was still covered under the omnibus clause of section 1503.[7]

The importance of the legislative history to this case is that in removing the conflict between the Ninth Circuit and the Second Circuit, Congress indicated what type of

[7] In view of the result we reach, it is unnecessary to revisit the question of whether *Lester* was correctly decided.

non-coercive conduct was meant to be proscribed with regard to witnesses. It is conduct that "*corruptly persuades . . . or attempts to do so*" in order to influence or prevent the testimony of any person in an official proceeding.

In order to sustain a conviction under the omnibus clause of section 1503, it must found that Judge Aguilar's actions "corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice." Congress's translation of this requirement as it pertains to witnesses, by its amendment to section 1512, indicates that the conduct must involve a defendant who "corruptly persuades . . . or attempts to [persuade]" a witness so as to influence his testimony.

If a person sought to influence the testimony of a witness by bribery or extortion, this would clearly fall within the normally accepted meaning of corrupt. Simply making a false statement to a potential witness is a far cry from any generally accepted meaning of "corrupt influence" or "corrupt persuasion."[8] To place in contrast the type of

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[8] We find *United States v. Poindexter*, 951 F.2d 369 (D.C.Cir. 1991), *cert. denied*, ___ U.S. ___, 113 S.Ct. 656, 121 L.Ed.2d 583 (1992), most helpful on this point. In that case the D.C. Circuit held that the term "corruptly," as used in 18 U.S.C. § 1505, was unconstitutionally vague as applied to Poindexter's false statements to Congress. The court's interpretation of section 1505 was based on section 1503, since the language of section 1505, including its "omnibus clause," was borrowed from section 1503.

The *Poindexter* court found that while the defendant's false statements violated section 1001, they were not obviously encompassed within section 1505's prohibition against corruptly influencing, obstructing or impeding a congressional inquiry. The court found that the term corruptly—although "at least as used in § 1503, . . . is something more specific than simply 'any immoral method used to influence a proceeding,' "—did not give constitutionally sufficient

conduct that would be corrupt influence, consider the following hypothetical fact situation: FBI agents go to a judge, state that they have done an investigation, and reveal certain facts that they intend to relate to a grand jury, which indicate that the judge had engaged in a conspiracy to influence another judge. If the defendant judge appeals to them not to so testify because it would harm his career, offers them a bribe not to testify, or threatens that he will see that they lose their jobs if they testify—that would amount to an attempt to corruptly influence the FBI agents to change their testimony.

There is no evidence that Judge Aguilar tried to tell the FBI how to testify, tried to persuade them not to testify, or tried to dissuade them from testifying as to what their investigation otherwise revealed. The only evidence is that he made false and misleading statements to the FBI regarding his contacts with Chapman and Solomon. This is very different from the other types of activities enumerated in section 1503.[9]

There is a significant difference between making a false statement to a potential witness and trying to persuade a witness to change his or her testimony through threats, force, bribery, extortion or other means of corrupt per-

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notice that it prohibited false statements to Congress. *Poindexter*, 951 F.2d at 382, 386. Our construction of section 1503 renders this constitutional inquiry unnecessary, but we note that the constitutional issue raised and decided adversely to the Government in *Poindexter* is nearly identical to the issue that is present here and that we would be required to conduct the same analysis as the D.C. Circuit were we to construe the statute in the manner urged by the prosecution.

[9] *See United States v. Ryan*, 455 F.2d 728, 733 (9th Cir. 1972) (stating that under the "omnibus clause" of section 1503, "[t]he offense charged must be similar to those specified in the statute, applying the doctrine of *ejusdem generis*") (citing *United States v. Essex*, 407 F.2d 214 (6th Cir. 1969)).

suasion. Under our past case law, *only* section 1001 has ever covered simple false statements. Prior to its 1988 amendment, section 1503 extended to persuading a witness to tell a false story (*see United Sates v. Gates,* 616 F.2d 1103, 1105, 1107 (9th Cir. 1980)); the amendment explicitly shifted the prohibition on such "corrupt persuasion" of a witness to section 1512. At no point, however, has this court interpreted either section 1503 or section 1512 as barring the making of a false and misleading statement to a potential grand jury witness. Instead, Congress's use of the phrase "or corruptly persuades" is consistent with our past case law, corroborating our reliance on that later statutory language as a guide to interpreting the pre-amendment section 1503.

Construing section 1503 so broadly as to cover making false and misleading statements to FBI agents would implicate the Fifth Amendment concerns underlying the exculpatory no doctrine of section 1001. *Cf. United States v. Alzate-Restreppo,* 890 F.2d 1061, 1068 (9th Cir. 1989) (Patel, J., concurring, joined by D.W. Nelson, J.); *United States v. Lambert,* 501 F.2d 943, 946 n.4 (5th Cir. 1974) (exculpatory no doctrine stems from judges' "latent distaste for an application of the statute that is uncomfortably close to the Fifth Amendment"). Thus, interpreting section 1503 as overlapping with section 1001 would at the very least require us to engraft the exculpatory no doctrine onto section 1503.

If "corruptly influence" is extended to mean "making false statements to a potential witness," we will have expanded the statute far beyond its reasonable construction. If for no other reason, the rule of lenity would preclude such a construction. As we discussed in connection with the wiretap charge, in interpreting a criminal statute, where there is possible ambiguity, the more lenient con-

struction is required. *United States v. Baxley,* 982 F.2d 1265, 1270 (9th Cir. 1992).

For the above reasons we conclude that the record in this case fails to establish that Judge Aguilar violated 18 U.S.C. § 1503.

V.

CONCLUSION

We reverse the convictions on both Counts VI and VIII because neither section 2232(c) nor section 1503 extends to the facts of this case. Consequently, we do not reach Judge Aguilar's contention that an erroneous knowledge instruction compels reversal nor the Government's cross-appeal contending that the district judge erred in sentencing.

REVERSED.

FERNANDEZ, Circuit Judge, in which WALLACE, Chief Judge, joins, concurring and dissenting:

I concur in the majority's opinion regarding Count Eight. However, I must respectfully dissent as to Count Six. In my opinion, 18 U.S.C. § 2232(c) does cover Judge Aguilar's actions. As I see it, the government was required to prove that Judge Aguilar knew that a wiretap had been applied for; that Judge Aguilar intended to obstruct or impede the interception for which the application was designed to obtain authorization; and that Judge Aguilar gave or attempted to give notice of the possible interception.

For purposes of this opinion, I (along with the majority) will take it as a given that Judge Aguilar knew of the wiretap application.[1] I also take it that he even knew that a

[1] His conversation with Judge Peckham indicates that.

wiretap might well result from that application.[2] I further take it that he did not know about the later applications and wiretaps, including the one which was in place when he made his disclosures to Chapman, although the latter assumption is somewhat problematic. He certainly talked and behaved as if he thought a wiretap *was* in place.

It cannot be doubted that Judge Aguilar conveyed information to Chapman with the intent to impede interception. We need not be concerned with whether he thought that the initial wiretap authorizations were extended or thought something else. We need only take him at his word. He did think that the information disclosed to him meant that Chapman's conversations were being intercepted by a wiretap.

That leaves only the question of whether Judge Aguilar would have attempted "to give notice of the possible interception." 18 U.S.C. § 2232(c) (West Supp. 1993). The majority reads this to mean that an interception must have been objectively possible at the time the notice was given or at the time that the attempt to give notice was made. I believe that is a strange way to read the statute. To my mind, the statute must be read to mean that a defendant has fulfilled this element upon attempting to warn someone that an interception of that person's telephone communications is possible. Here the defendant, Judge Aguilar, was correct. Interception *was* then possible. But that is not the point. The point is that Judge Aguilar's own wrongdoing was his attempt to give a notice that would interfere with a wiretap. Here his attempt to interfere could have gone awry for any of a number of reasons. His nephew might not have conveyed his message. The telephone lines could have come down while he was calling a

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[2] Indeed, in his conversation with Solomon he said, "Oh yeah the phone's definitely tapped. . . . Absolutely."

target. The wiretap might not have been in place; indeed, there never was a wiretap on Chapman's own telephone. Chapman may no longer have been targeted. The authorization itself might not have been granted pending further information. The wiretap might have expired. Etc.

Of course, Judge Aguilar's concrete action was the notice he gave or attempted to give. That is the only thing that went beyond mental states—knowledge, intent, belief that interception was possible, and belief that interception could be obstructed. When a defendant tries to give notice, we can be sure that we are not punishing thoughts alone. Rather, his wrongdoing becomes manifest, just as it did here. Judge Aguilar matched his actions to his thoughts. He attempted to give notice of the possible interception of Chapman's conversations.

It seems to me that the statute is clear enough on this point to make resort to legislative history unnecessary. *See United States v. Galliano*, 977 F.2d 1350, 1352 (9th Cir. 1992), *cert. denied*, ____ U.S. ____, 113 S.Ct. 1399, 122 L.Ed.2d 772 (1993). But if we do so resort, any doubt is removed by two salient comments in the brief Senate Report. *See* S.Rep. No. 541, 99th Cong., 1st Sess. 1, 34 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3588.[3] That report indicates an intent to punish conduct which gives notice of the possible interception to someone who *was* a target. *Id.* Use of the past tense shows that the person may no longer be a target, so that no interception would remain possible in the objective sense. More importantly, the report states that "[t]he offense also includes an attempt to engage in the offense." *Id.* At the very least, Judge Aguilar made that attempt. He did his very best to obstruct any possible interception of Chapman's telephone conversations.

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[3] The House Report is to the same effect. *See* H.R.Rep. No. 99-647, 99th Cong., 2d Sess., at 61 (1986).

I am not unaware of the rule of lenity, but it should only be applied when there is some "grievous ambiguity or uncertainty" which cannot be overcome. *Chapman v. United States,* 500 U.S. 453, ____, 111 S.Ct. 1919, 1926, 114 L.Ed.2d 524 (1991). There is no such ambiguity here. Perhaps in saying that I show too much temerity in the face of the majority opinion. However, I cannot find opacity where a straight-forward reading of the statute gives fair warning to the citizen of what is required to violate its terms. I believe that to be the case here. I do not think one has to try to convert dross into precious metal in order to reach this conclusion; rather, I think that by some exercise of thaumaturgy gone awry, the majority has turned gold into lead. Judge Aguilar "knew" of the application, intended to impede the interception which would flow from that application, and told Chapman that it was possible that his conversations would be intercepted. That is all the government had to prove.

I refrain from discussing the other issues that would have to be wrestled with before actually affirming Judge Aguilar's conviction, such as the meaning of knowledge. Given the majority opinion, that discussion would encumber the reports without deciding anything.

In sum, I agree with the majority that Judge Aguilar's conduct cannot lead to a conviction under 18 U.S.C. § 1503, but I believe that it could, and properly did, lead to a conviction under 18 U.S.C. § 2232(c).

APPENDIX B

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

Nos. 90-10597, 91-10024

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

ROBERT P. AGUILAR,
DEFENDANT-APPELLANT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE-CROSS-APPELLANT

v.

ROBERT P. AGUILAR,
DEFENDANT-APPELLANT-CROSS-APPELLEE

Appeal from the United States District Court
for the Northern District of California

Argued and Submitted Dec. 12, 1991
Decided May 12, 1993
As Amended Aug. 9, 1993
Rehearing En Banc Ordered Sept. 2, 1993

Before: HUG, HALL and O'SCANNLAIN, Circuit Judges.

ORDER

On June 13, 1989, a federal grand jury returned an eight count indictment against United States District Judge Robert P. Aguilar. The indictment charged Judge Aguilar with conspiring to defraud the United States in violation of 18 U.S.C. § 371, disclosing the existence of a wiretap application in violation of 18 U.S.C. § 2232(c) (counts four and six), endeavoring to obstruct justice in violation of 18 U.S.C. § 1503 (counts seven and eight), and racketeering in violation of 18 U.S.C. § 1962(c). In August 1990, Judge Aguilar went to trial on five of the counts and, on August 22, a petit jury found him guilty on one count of illegally disclosing a wiretap in violation of 18 U.S.C. § 2232(c) (count six) and one count of endeavoring to obstruct a grand jury investigation in violation of 18 U.S.C. § 1503 (count eight). It acquitted Judge Aguilar on the other three counts. On November 1, 1990, the district court sentenced Judge Aguilar to two six month terms of imprisonment, to be served concurrently, and fined him $2,000. Aguilar appeals his conviction on both counts and the government appeals his sentence.

The separate opinions of Judges Hug and O'Scannlain are filed contemporaneously with this order and opinion. The conviction for wiretap disclosure, count six of the indictment, is AFFIRMED for the reasons expressed in this opinion, as to which Judge O'Scannlain concurs in part. The conviction for obstruction of justice, count eight of the indictment, is REVERSED for the reasons expressed in the dissenting opinion of Judge Hug, as to which Judge O'Scannlain concurs in part. The sentence of six months' imprisonment and fine of $1,000 under count six is VACATED for the reasons expressed in the opinion of Judge O'Scannlain, as to which Judge Hug concurs in part, and REMANDED for reconsideration in light of

United States v. Lira-Barraza, 941 F.2d 745 (9th Cir.1991) (en banc).

OPINION

CYNTHIA HOLCOMB HALL, Circuit Judge:

I

BACKGROUND [1]

The chain of events leading to Judge Aguilar's indictment began with the 1980 conviction of Michael Rudy Tham for embezzling $2,000 from Local 856 of the Freight Checkers, Clerical Employees and Helpers Union, an affiliate of the International Brotherhood of Teamsters. Tham was Secretary-Treasurer of Local 856 and a member of several local and national Teamster committees. In July 1987, Tham filed a motion under 28 U.S.C. § 2255 to have the conviction set aside. In an effort to gain favorable treatment from District Judge Stanley Weigel, Tham sought the assistance of attorney Edward Solomon, an acquaintance of Judge Aguilar, and Abraham Chalu-

[1] Judge Hug's proposition that we view the facts from Judge Aguilar's perspective because the jury acquitted him on the conspiracy charge is novel, to say the least. *See post* at 627-28 (Hug, J., dissenting). The acquittal did not prove Aguilar's innocence; at most it proves a reasonable doubt as to his guilt. *See United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361-62, 104 S.Ct. 1099, 1104, 79 L.Ed.2d 361 (1984). We have no way of knowing whether the jury acquitted Aguilar on the evidence or by way of mistake, compromise or lenity. *See United States v. Powell*, 469 U.S. 57, 65, 105 S.Ct. 471, 476, 83 L.Ed.2d 461 (1984). We do know that the jury did not credit all of Judge Aguilar's testimony, given the two convictions. We view the evidence and the inferences to be drawn therefrom in the light most favorable to the verdicts. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); *United States v. Bishop*, 959 F.2d 820, 829 (9th Cir. 1992).

powitz, alias "Trigger Abe" Chapman, a putative mobster distantly related to Judge Aguilar by marriage. Chapman arranged a September 12, 1987, meeting between Solomon and Judge Aguilar to discuss Tham's case and how Judge Aguilar could assist Tham's petition. Over the next several months, Judge Aguilar discussed the case regularly with Chapman and Solomon, reporting to them his conversations with Judge Weigel about the matter.

Throughout this time, the San Francisco FBI was investigating local labor racketeering as part of a nationwide probe into health care provider fraud. Tham and Chapman were among the subjects of the investigation. On April 20, 1987, the FBI applied to then-Chief United States District Judge Robert Peckham for authorization to conduct electronic surveillance of Tham's business telephones and named Chapman as an interceptee of the wiretap. On May 20, the wiretap expired and, on July 15, Judge Peckham signed the first of a series of orders maintaining the secrecy of the wiretap while the investigation was ongoing. The last of the orders was signed on January 25, 1989.

As the investigation progressed, the FBI discovered that Chapman had a relationship with Judge Aguilar. On July 9, state agents observed Chapman leaving the Federal Building in San Jose with Judge Aguilar. The state agents informed the FBI and the FBI informed Judge Peckham. Judge Peckham expressed his concern, as well as his belief that Judge Aguilar must have been ignorant of Chapman's criminal activities.

A month later at an ABA reception in the Mark Hopkins Hotel in San Francisco, in an effort to warn Judge Aguilar about the character of the company he was keeping and help him avoid the appearance of impropriety, Judge Peckham mentioned to Judge Aguilar that

Chapman's name had come up in connection with a wiretap application. He remarked that years earlier, as an Assistant United States Attorney, he had prosecuted Chapman on a drug charge and expressed his surprise that Chapman was still involved in criminal activity. Judge Aguilar indicated that he knew Chapman, but disclosed nothing else about their relationship.

Several months later, on February 6, 1988, Chapman paid a visit to Judge Aguilar at his home. As Chapman was leaving, Aguilar noticed that they were being observed from across the street by a man whom Judge Aguilar suspected was an FBI agent. Immediately Judge Aguilar telephoned his nephew Steve Aguilar, Chapman's grandson, and asked him to come to Aguilar's house. When Steve arrived, Judge Aguilar told him that an FBI agent was following Chapman and that he had heard "at work" that Chapman was being wiretapped. He instructed Steve to relay the information to Chapman, which he apparently did.

On April 26, 1988, a grand jury in the Northern District of California began to hear evidence regarding a conspiracy by Judge Aguilar, Tham, Chapman and Edward Solomon to influence the outcome of Tham's case. In May, Solomon agreed to cooperate with the FBI. On May 17, Solomon wore a wire to a luncheon meeting with Judge Aguilar. Over the course of their conversation, Judge Aguilar revealed that he had discussed the Tham matter with Judge Weigel and had warned Chapman about the wiretap. He also instructed Solomon to lie to the FBI about Aguilar's involvement in Tham's case. On May 26, Solomon recorded a second conversation in which he informed Aguilar that a grand jury was investigating their dealings in the Tham case. The two men also discussed how Solomon should lie to the grand jury in order to

explain the records of Solomon's telephone calls to Judge Aguilar regarding the Tham matter.

Armed with this evidence, two FBI agents met with Judge Aguilar on June 22, 1988, and questioned him about his involvement in the Tham case. Before Judge Aguilar would respond to any questions, he wanted to know if he was a "target" of a grand jury investigation. Agent Carlon hesitated in answering the question, but when Aguilar said, "I assume from this that I very likely am [a target] if I've done anything wrong," Carlon responded affirmatively. Judge Aguilar then proceeded to lie to the agents about his relationship with Solomon, his involvement in the Tham case, and his knowledge of the wiretap. In response to Aguilar's further questions about whether or not he was a target, Carlon conceded that a grand jury was meeting, but would say nothing about the subject of the investigation or Aguilar's status. The interview continued and Aguilar lied further about his dealings with Chapman. At trial, Judge Aguilar testified that, by the end of the interview, he had concluded that his statements would be presented to the grand jury.

Based on this evidence, the jury convicted Judge Aguilar on one count of disclosing the existence of a wiretap in violation of 18 U.S.C. § 2232(c) and one count of endeavoring to obstruct a grand jury investigation in violation of 18 U.S.C. § 1503. Aguilar appeals each conviction on several grounds. He argues that the government's evidence was insufficient to prove that he satisfied the "knowledge" requirement of either section 2232(c) or section 1503; that the jury instructions misstated the "knowledge" elements of the statutes; and that the instructions impermissibly shifted to him the burden of proving that he lacked the knowledge required by these statutes. He also argues that the application of section 2232(c)

to his disclosure of the wiretap violates his First Amendment right to free speech.

The government appeals Judge Aguilar's sentence, arguing that the district judge had no authority to depart downward six levels from the sentence level prescribed in the Sentencing Guidelines.

II

DISCLOSURE OF THE WIRETAP

The wiretap disclosure statute, 18 U.S.C. § 2232(c),[2] makes it a crime for any person *with knowledge* that a wiretap authorization has been applied for or granted to divulge that knowledge with the purpose of impeding the interception of communications. Accordingly, the trial court instructed the jury that the government was required to prove that "defendant had knowledge that authorizations to conduct electronic surveillance of Abe Chapman had been applied for." The court continued:

> Knowledge of a fact, members of the jury, means that you're satisfied from the evidence that he knew it[.] Or knowledge of the existence of a particular circumstance may be satisfied by proof that the defendant *was aware of a high probability of the existence of that circumstance*[,] *unless you find from the evidence that the defendant actually believed that the circumstance did not exist.*

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[2] Whoever, having knowledge that a Federal investigative or law enforcement officer has been authorized or has applied for authorization under chapter 119 to intecept a wire, oral, or electronic communication, in order to obstruct, impede or prevent such interception, gives notice or attempts to give notice of the possible interception to any person shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 2232(c) (1988).

(emphasis added). Aguilar raises four challenges to his conviction under section 2232(c). He argues that: (1) the evidence was insufficient to demonstrate that he had "knowledge" that the FBI had applied to conduct a wiretap; (2) application of section 2232(c) to Aguilar's disclosure of the wiretap violated his First Amendment right to free speech; (3) the trial court's jury instruction on the "knowledge" requirement of section 2232(c) misstated the element; and (4) the "knowledge" instruction unconstitutionally shifted the burden of proof on "knowledge" onto Aguilar.

A. Sufficiency of the Evidence

Aguilar argues that the evidence was insufficient to show that he had knowledge of a wiretap application. In reviewing the sufficiency of the evidence, this Court must determine whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

A defendant may not be convicted under section 2232(c) for disclosing a wiretap unless there is sufficient evidence to show that he knew that permission to conduct a wiretap had been applied for or granted. The evidence in this case was sufficient to convince a rational trier of fact that Judge Aguilar had such knowledge. The jury heard the tape of the May 17 conversation between Judge Aguilar and Edward Solomon, in which Judge Aguilar stated that he "knew they were wiretapping [Chapman]," and described learning about the wiretap from Judge Peckham. A criminal defendant's own statements about his knowledge are as strong evidence of that knowledge as a jury is ever likely to hear. This evidence was reinforced by

Judge Peckham's testimony that he told Judge Aguilar about the wiretap application and Steven Aguilar's testimony that his uncle told him that he had learned at work that Chapman's telephone had been tapped.[3]

Aguilar argues that "the fact that both the application and the wiretap had long since expired when he first heard about the subject from Judge Peckham strongly suggests that he lacked the actual knowledge required by the statute." Aguilar's argument ignores the plain language of section 2232(c). The statute imposes liability on anyone "having knowledge that a Federal investigative or law enforcement officer *has been authorized or has applied* for authorization" to conduct a wiretap. 18 U.S.C. § 2232(c) (1988) (emphasis added). This language makes it unlawful to reveal a wiretap with the wrongful purpose required by section 2232(c) although the authorization is no longer current.

The dissent, agreeing with Aguilar, invites us to read "has been authorized" as "is currently authorized." Although we find the statutory language standing alone sufficiently clear to rule out this construction, we note that the legislative history accompanying the enactment of section (c) also refutes this interpretation: the report describing the newly-created offense stated that the statute prohibits "giving notice of the possible interception to any person *who was or is* the target of the interception." S.Rep. No. 541, 99th Cong., 1st Sess., 1, 34 (1986) (em-

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[3] Contrary to the dissent's characterization, we do not conclude that Judge Aguilar had knowledge of the new wiretap on Chapman's telephone in effect during February 1988. *See post* at 636 (Hug, J., dissenting). Rather, we conclude that the evidence of his knowledge of the May 1987 wiretap on Tham's telephone is sufficient to support his conviction for the February 6 disclosure of that wiretap to Chapman, an interceptee of that wiretap.

phasis added), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3588.

Congress has set a limit upon the time during which a wiretap may remain secret. *See* 18 U.S.C. § 2518(8)(d) (1988). It has also provided for extensions of that time upon a showing of good cause. *See id.* We are not here confronted with a prosecution for disclosure of a wiretap after the government had already served notice of the wiretap upon the interceptee, which might raise more troubling questions of the nature posed by the dissent. In this case, although the specific wiretap of which Judge Aguilar had learned expired on May 20, 1987, the district court ordered its secrecy maintained through January, 1989. Moreover, other wiretaps were authorized in the interim; wiretaps for which Chapman was an interceptee were in place from September 11 to October 12, 1987, and from October 21, 1987, through May 8, 1988. Thus, at the time Aguilar warned Chapman of the surveillance, it was still lawfully secret.

The dissent reads the statute to require that a defendant must intend to impede the specific *unexpired* wiretap of which he has knowledge before he can violate the law. *See post* at 628, 629. This construction permits the disclosure of any expired wiretap authorization, regardless whether the wiretap is still secret and regardless whether the disclosure may impede ongoing undercover investigations. To interpret section 2232(c) to permit disclosure by third parties while the government has obtained judicial approval to maintain secrecy would defeat the purpose of section 2518(8)(d). It is unlikely Congress intended to permit judicially-authorized surveillance efforts to be frustrated by such a narrow reading of the statute. As such a reading is incompatible with the statutory language, we reject it.

The dissent's emphasis on the existence of some interception with which disclosure of the particular wiretap could potentially interfere is unduly concerned with the possibility of actual intereference. We think that the statute's primary concern is with the giving of notice with specific intent to interfere with surveillance. That such notice may not actually, nor even possibly, impede the particular surveillance episode of which Aguilar learned from Judge Peckham is less important.[4] Apart from the statutory language itself, this is evidenced by the fact that the statute also prohibits attempts to engage in such conduct.[5]

B. Freedom of Speech

Aguilar also argues that section 2232(c), by punishing him for speaking about the wiretap, violates his First Amendment right to free speech. We review constitutional challenges to statutes de novo. *United States v. Scampini,* 911 F.2d 350, 351 (9th Cir.1990).

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[4] We note that impossibility is generally not a defense to a crime. *See e.g., United States v. Quijada,* 588 F.2d 1253, 1255 (9th Cir.1978) ("generally, a defendant should be treated in accordance with the facts as he supposed them to be."). The fact that the particular wiretap had expired should not insulate Aguilar from his attempt to frustrate the surveillance effort, particularly where, as here, subsequent wiretaps were in place such that he accomplished his objective.

[5] We fail to see the significance of the fact that Congress chose to forbid attempted disclosures in the same statute in which it forbade disclosure. *See post* at 636 (Hug, J., dissenting). We also note that "erroneous belief" as to the existence of a wiretap only permits a conviction under section 2232(c) when accompanied by the specific intent to impede an interception. *See* 18 U.S.C. § 2232(c). This "guilty belief" is equivalent to "knowledge" in the sense of subjective certainty; it may be objectively incorrect, but it is nonetheless culpable when coupled with the proscribed conduct of disclosure.

Aguilar does not dispute that if he had a duty to maintain the confidentiality of the wiretap application, he had no First Amendment right to disclose the application. *See Snepp v. United States,* 444 U.S. 507, 509 n. 3, 100 S.Ct. 763, 765 n. 3, 62 L.Ed.2d 704 (1980) (per curiam). Rather, he argues that section 2232(c) violates his First Amendment rights because he had no such duty. He contends, therefore, that the district court erred by refusing to instruct the jury that "knowledge [for] the purposes of 2232(c) must come from confidential information, information derived from the judge[']s employment." Failure to give this instruction, he argues, deprived him "of the right to have the factual dispute about whether the disclosure involved a breach of duty resolved by the jury." Aguilar maintains that had the jury been given the opportunity to consider this question, it would have found that he had no duty. The government could not have demonstrated the confidentiality of the information Aguilar received from Judge Peckham because it could not "articulate any conceivable relationship between the disclosure by Judge Peckham and Judge Aguilar's official duties."

The problem with Aguilar's argument is that it posits limits on his responsibilities as a federal judge that do not exist. It simply does not matter that Judge Peckham informed him of the wiretap at a cocktail party rather than in chambers, or some other "official" setting. Judge Aguilar had a duty not to disclose the information because it came from Judge Peckham and *related* to that official judicial business. The duty stemmed not from the place or time at which Judge Aguilar heard the information, but from the nature and source of the information.

In *Snepp* the Supreme Court considered whether a former CIA agent had a First Amendment right to publish a book on CIA activities in South Vietnam, based on

information learned during the course of his employment. The Court found that an agreement Snepp had signed with the CIA prohibited him from publishing without CIA approval. But the Court noted that "apart from the plain language of the agreement, the nature of Snepp's duties and his conceded access to confidential sources and materials could establish a trust relationship." 444 U.S. at 511 n. 6, 100 S.Ct. at 766 n. 6. The same can be said of federal judges. Every day, we discuss confidential court business with our colleagues and our staff. It is well understood we are not free to discuss these matters with the attorneys that appear before us, with our families, or with our friends outside the court. Although it is difficult to find authorities discussing the existence of a duty on the part of federal judges to guard the confidentiality of their communications with their colleagues, that is undoubtedly because "its existence and validity has been so universally recognized. Its source is rooted in history and gains added force from the constitutional separation of powers of the three departments of government." *Nixon v. Sirica,* 487 F.2d 700, 740 (D.C.Cir.1973) (MacKinnon, J., dissenting) (discussing existence of a privilege protecting disclosure of communications among judges).

Our conclusion about the nature of the judicial duty of confidentiality is backed by recognition that were it not for the existence of such a duty, Judge Aguilar would never have learned of the wiretap. Judge Peckham testified that he believed Judge Aguilar would keep the matter confidential. Surely he felt free to relate information about a wiretap application to Judge Aguilar only because he regarded the conversation as confidential. Judge Aguilar's access to the information regarding the wiretap was a consequence of his judicial position and he therefore had a duty not to disclose the information.

Several years ago, a special federal appeals panel held that communications among judges "relating to official judicial business" are protected by a qualified privilege. *See In re Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit,* 783 F.2d 1488, 1520 (11th Cir.), *cert. denied,* 477 U.S. 904, 106 S.Ct. 3273, 91 L.Ed.2d 563 (1986). The court did not restrict the privilege to information a judge discloses to his staff or colleagues during the course of his official duties. It held that the privilege protected material "relating to official judicial business." We see no reason to circumscribe the corresponding official duty of confidentiality more narrowly.

If we were to accept Aguilar's logic, we would have to conclude that a judge never has a duty to keep confidential the information he or she learns from other judges in a social setting. There is a range of internal matters that judges and courts jealously guard from the public eye. Aguilar's "official duties" limitation on his duty of confidentiality would permit judges to freely disgorge these matters if they were to learn about them over lunch with a colleague, or at a cocktail party at another judge's home. The spectre of such disclosure alone is enough to stifle discussion among the members of the federal judiciary and undermine the integrity of the Article III branch.

Aguilar argues, however, that his acquittal on court four, which charged him with disclosing the wiretap in August 1987, after he spoke with Judge Peckham but before he saw the FBI agent observing Chapman, demonstrates that the jury concluded that he gained the requisite knowledge from his observation of the agent, not his conversation with Judge Peckham. He argues that even if he had a duty not to disclose what he learned from Judge Peckham, he had no such duty not to disclose

what he learned from his own observation. We need not consider whether a federal judge's duty of confidentiality is limited in this manner, because there can be no doubt that Judge Aguilar's knowledge of the wiretap was based on what he learned from Judge Peckham. He himself said it.

Aguilar's nephew testified that when Aguilar informed him of the wiretap he said he had learned of the wiretap "at work." Indeed, the only sensible explanation for Judge Aguilar's knowledge is that when he saw the FBI agent trailing Chapman, he recalled his conversation with Judge Peckham and put two and two together; it is difficult to imagine how his observation of the FBI agent alone could have led him to conclude that Chapman's telephone had been tapped. If Judge Aguilar's knowledge were based even partially on what Judge Peckham told him, then he had a duty not to disclose it. The jury could have acquitted Judge Aguilar of count four for a number of reasons; there is no reason for us to conclude that it acquitted him because he lacked "knowledge." We decline Aguilar's invitation to draw conclusions about the jury's reasoning based on its decision to acquit him of count four.

Because Judge Aguilar had a duty not to disclose the wiretap, nothing in the First Amendment would prohibit the jury from applying section 2232(c) to his conduct.

C. Misstatement of the Knowledge Element

Aguilar argues that the court's definition of knowledge as the awareness of a "high probability" of the existence of a fact was improper. He contends that this definition describes an objective state of mind akin to "negligence." The definition, he suggests, conflicts with the "basic and widely understood" principle that knowledge is a subjective state of mind requiring "actual awareness" of a fact.

It is this "settled interpretation" of knowledge that Congress must have had in mind when it drafted section 2232(c), according to Aguilar. The definition used by the trial court, which Aguilar refers to alternatively as a "diluted" or "objective" standard of knowledge, is only appropriate when there is evidence that a defendant has consciously avoided learning an incriminating fact. If there is no such evidence, an instruction employing this definition creates the risk that the jury will convict the defendant for what he *should have* known, he argues. *See United States v. Garzon,* 688 F.2d 607, 609 (9th Cir.1982); *United States v. Murrieta-Bejarano,* 552 F.2d 1323, 1325 (9th Cir.1977). Because there was no evidence of "deliberate indifference" in this case, Aguilar maintains the government was required to prove that he possessed "actual knowledge." Whether a jury instruction misstates an element of an offense is a question of law that this court reviews de novo. *United States v. Spillone,* 879 F.2d 514, 525 (9th Cir.1989), *cert. denied,* 498 U.S. 878, 111 S.Ct. 210, 112 L.Ed.2d 170 (1990).

The Electronic Communications Privacy Act of 1986, Pub.L. No. 99-508, § 109, 100 Stat. 1858 (1986) ("the Act"), of which section 2232(c) is a part, is silent on the meaning of the statute's mens rea requirement. *See* 18 U.S.C. § 2510 (1988). Left without guidance from the statutory text, the trial judge turned to the legislative history and concluded that Congress had imported the Model Penal Code definition of "knowledge"[6] into the Act. Although the legislative history is of little help in discern-

[6] "(7) *Requirement of Knowledge Satisfied by Knowledge of High Probability.* When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes it does not exist." Model Penal Code § 2.02(7) (Proposed Official Draft 1962).

ing Congress's intent,[7] I conclude that the trial judge's definition was perfectly appropriate. The Model Penal Code view that one has knowledge of an attendant fact when one is "aware of a high probability of its existence" is as accurate a description of the subjective state of mind I call "knowledge" as any I can imagine.

I would reject the premise that Model Penal Code section 2.02(7) does not comport with traditional understandings of "knowledge." We have "actual" or "positive" knowledge of very few things we claim to "know." If we need a carton of milk, we go to the grocery store because we "know" there will be milk on the shelves. We slow down before we reach a yellow traffic light because we "know" that by the time we reach the light it will have turned red. Willie Sutton robbed banks because, to paraphrase the legendary thief, he "knew" the money was there. One could conceive of countless similar examples of facts we "know," not because we have actual knowledge of their correctness—knowledge that comes only when we arrive at the dairy section, when the light turns red, or when we enter the bank safe—but because we are "aware of a high probability" that the fact exists. And despite

[7] A passage in the House Report on the Act states that section 2232(c) requires "that the defendant have knowledge that the federal law enforcement or investigative officer has been authorized to or has applied for an interception order." H.R.Rep. No. 647, 99th Cong., 2d Sess. 1, 60 (1986). The word "knowledge" is footnoted "[s]ee House Report 96-1396, Criminal Code Revision Act of 1980, at 32-36." *Id.* at 60 n. 91. The cited pages describe the mens rea requirements of the Model Penal Code, which were to have been adopted as part of the 1980 reform proposal. *See* H.R.Rep. No. 1396, 96th Cong., 2d Sess. 1, 32-36 (1980). The Report does not resolve the question at issue here—whether Congress believed that definition should apply in cases where "deliberate ignorance" is not an issue. *See id.* at 35-36.

Aguilar's contention, this state of mind differs from "actual knowledge" only in degree, not in kind. It is a *subjective* belief based on fact.

Courts have long recognized that "actual awareness" is only a subset of what we commonly think of as "knowledge." " 'Absolute knowledge can be had of very few things,' . . . and the philosopher might add 'if any.' For most practical purposes 'knowledge' is not confined to what we have personally observed or to what we have evolved by our own cognitive faculties." Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 865 (3d ed. 1982) (quoting *Story v. Buffum,* 90 Mass. 35, 38 (1864) and *State v. Ransberger,* 106 Mo. 135, 17 S.W. 290, 292 (1891)). Indeed, courts have often employed a definition of "knowledge" less demanding than that of the Model Penal Code. Courts routinely hold that a defendant may satisfy the "knowledge" requirement for the crime of receipt of stolen goods if he merely has a "guilty belief" that the goods are stolen. *See id.* at 865-75.

Professor Perkins notes that the law will view the requirement of "knowledge" differently in different circumstances. He gives the example of a person who has been told that a certain bill of exchange is a forgery and believes the statement to be true. "Obviously [the person does not have 'knowledge' of the forgery] if the purpose of the inquiry is to determine whether he is qualified to take the witness stand and swear that the instrument is false; but if he passes the bill as genuine he will be uttering a forged instrument with 'knowledge' of the forgery if his belief is correct." *Id.* Likewise, it would make no sense for courts to require that violators of section 2232(c) have the same degree of knowledge that they would require of witnesses. Judge Aguilar would not be qualified to testify that a wiretap application had been sumitted unless he had

witnessed the application. But if that degree of "knowledge" was required for prosecution under section 2232(c), then only the FBI agent and United States Attorney who applied for the wiretap and the judge who granted it could be subject to prosecution, and that surely is not what Congress intended to be the coverage of the statute.

Despite all this, Aguilar argues that the drafters of the Model Penal Code conceived of section 2.02(7) not as a definition of knowledge, but as an exception to the traditional requirement of "actual" knowledge applicable only when there is evidence that a defendant has remained deliberately ignorant of a fact. He suggests that courts have ratified this limitation. Nothing in the text of section 2.02(7) even implies the limitation Aguilar proposes. Aguilar, however, fastens onto the commentary to section 2.02, which states that "[s]ubsection (7) deals with the situation that British commentators have denominated as 'willful blindness.' " Model Penal Code § 2.02 comment 9 (Proposed Offical Draft 1962). A more thorough reading of the comment reveals that the drafters did not conceive of subsection (7) as an *exception* to the knowledge requirement applicable only when "willful blindness" is an issue, but rather as a comprehensive *definition* of knowledge designed to account for "willful blindness." "The inference of 'knowledge' of an existing fact is *usually* drawn from proof of notice of high probability of its existence, unless the defendant establishes an honest, contrary belief. Subsection (7) solidifies this *usual* result and clarifies the terms in which the issue is submitted to the jury." *Id.* (emphasis added). Read in its entirety, the meaning of comment 9 is clear: section 2.02(7) was designed to incorporte the concept of "willful blindness" into a general definition of knowledge that would limit the equation of "willful

blindness" to "knowledge" to circumstances in which the defendant really did have knowledge. *See* Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 3.5(b), at 307-08 (1986) ("The Model Penal Code requirement of an awareness of a high probability of the existence of the fact serves to ensure that the purpose to avoid learning the truth is culpable.").

This circuit first adopted the Model Penal Code definition in *United States v. Jewell,* 532 F.2d 697 (9th Cir.) (en banc), *cert. denied,* 426 U.S. 951, 96 S.Ct. 3173, 49 L.Ed.2d 1188 (1976). There we recognized that section 2.02(7) purported to be a general definition of knowledge and we approved of it as such. "[I]n common understanding one 'knows' facts of which he is less than absolutely certain. To act 'knowingly,' therefore, is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question." *Id.* at 700. Judge (now Justice) Kennedy, writing for the dissent, agreed that section 2.02(7) is "a *definition* of knowledge, not a substitute for it." *Id.* at 707 (Kennedy, J., dissenting); *see also United States v. Yermian,* 708 F.2d 365, 371-72 (9th Cir.1983) (recognizing the Model Penal Code definition as *the* "subjective standard of criminal knowledge required by this circuit"), *rev'd on other grounds,* 468 U.S. 63, 104 S.Ct. 2936, 82 L.Ed.2d 53 (1984); 2 Edward J. Devitt et al., *Federal Jury Practice and Instructions* § 54.15, at 923 (1990) (citing *Jewell* for proposition that in drug possession crimes, "[a] defendant does not have to act with positive knowledge in order to be culpable. It is sufficient if the defendant acts with an awareness of the high probability of the fact in question.").

The Supreme Court's approval of section 2.02(7) as a general definition of knowledge is clear from its use of

the definition in cases in which "willful blindness" was not an issue. In *Leary v. United States,* 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969), the Court considered the constitutionality of a presumption in 21 U.S.C. § 176a that evidence sufficient to show that a defendant possessed marijuana is also sufficient to show that the defendant knew the marijuana was illegally imported. The Court employed section 2.02(7) to interpret the meaning of "knowing" in the statute. *See id.* at 46 n. 93, 89 S.Ct. at 1553; *see also Barnes v. United States,* 412 U.S. 837, 845, 93 S.Ct. 2357, 2363, 37 L.Ed.2d 380 (1973) (considering constitutionality of inference of knowledge from possession of stolen goods and upholding defendant's conviction for possession of stolen Treasury checks on ground that the evidence could support finding that defendant "must have known or been aware of a high probability that the checks were stolen"); *Turner v. United States,* 396 U.S. 398, 416, 90 S.Ct. 642, 652, 24 L.Ed.2d 610 (1970) (relying on section 2.02(7) definition to interpret knowledge presumption in federal drug possession statute, 21 U.S.C. § 174); *United States v. Hester,* 890 F.2d 799, 803 n. 4 (4th Cir.1989) ("[T]he Court has indicated general acceptance of the proposition that awareness of 'a high probability' that a fact exists may properly be equated with 'knowledge' in the interpretation of criminal statutes.") (citing *Leary,* 395 U.S. at 46 n. 93, 89 S.Ct. at 1553 n. 93).

Aguilar nevertheless argues that if applied where there is no evidence of "willful blindness," the Model Penal Code definition *by itself* implies a duty on the part of a defendant to learn a fact and therefore creates the risk that the defendant will be convicted for what he should have known. Aguilar relies on a line of cases holding that because a "willful blindness" instruction—which includes but is not limited to the Model Penal Code definition—

carries with it the risk that the jury will evaluate the defendant's behavior under a negligence standard and convict him for what he should have known, it should only be given in the rare case in which there is evidence that the defendant deliberately avoided learning the truth. *See e.g., United States v. Sanchez-Robles,* 927 F.2d 1070, 1073-75 (9th Cir.1991); *Garzon,* 688 F.2d at 609; *Murrieta-Bejarano,* 552 F.2d at 1325.

The risk identified by *Murrieta-Bejarano* and its progeny was never present in this case. That risk is created when an instruction that a defendant's conscious effort to avoid the truth is the equivalent of knowledge is given in a case where there is no evidence that the defendant did indeed consciously avoid learning the truth. In such a case, there is a risk that the jury will conclude that the defendant had some duty to inquire about the existence of the fact, if a reasonable person would have done so. *See Garzon,* 688 F.2d at 609. It is the instruction on conscious avoidance, not the Model Penal Code definition of knowledge which must accompany it, that implies the existence of a duty. In this case the district court did not instruct the jury on "conscious avoidance."

The Model Penal Code definition of knowledge standing alone implies no duty to discover fcts. Contrary to Aguilar's argument, the definition describes a subjective state of mind, and therefore cannot subject a defendant to liability for negligence.[8] *See Yermian,* 708 F.2d at 372 (subsection (7) as the " 'subjective' standard of criminal knowledge required by this circuit"); Ira P. Robbins, *The Ostrich Instruction: Deliberate Indifference as a Criminal Mens Rea,* 81 J.Crim.L. & Criminology 191, 227 (1990)

[8] Even the dissent recognizes that the knowledge instruction imposed a subjective standard. *See post* at 634-35 (Hug, J., dissenting).

("[T]he Model Penal Code formulation protect[s] the defendant from conviction for merely negligent behavior."). Indeed, the "balancing clause" of the definition, which instructs the jury that a defendant does not have knowledge if he "actually believes [the fact] does not exist," ensures that the defendant is not convicted for negligence. *United States v. Esquer-Gomez,* 550 F.2d 1231, 1235-36 (9th Cir.1977).

I would hold that the trial court did not err by instructing the jury that a person has knowledge if he is "aware of a high probability that a fact exists, unless he actually believes it does not exist." The definition describes a subjective state of mind and creates no risk that the defendant will be convicted for what he "should have known." Indeed it perfectly describes the state of mind that lay people typically regard as knowledge, that best fits the purpose of section 2232(c), and that this circuit and the Supreme Court have approved as a general definition of "knowledge." We conclude as well that the evidence of Judge Aguilar's "knowledge" was so substantial, that had the jury received no instruction, it would still have found that Judge Aguilar had knowledge of the wiretap.[9] We need not be concerned that the instruction might have allowed the jury to convict Aguilar "even if he was uncer-

[9] It seems to be the typical practice of judges on this circuit not to given any definition of "knowledge." The Ninth Circuit Model Jury Instructions do not include an instruction defining knowledge. And we have previously held that it is not error for a court not to define "knowingly." "The word is a common word which an average juror can understand and which the average juror could have applied to the facts of this case without difficulty." *United States v. Chambers,* 918 F.2d 1455, 1460 (9th Cir. 1990). As I have already indicated, I believe the average juror's understanding of "knowledge" comports with the instruction given in this case.

tain about whether there was a wiretap," as the dissent fears, since the evidence reflected no uncertainty: Judge Aguilar himself admitted in tape recorded conversations with Solomon that he "knew". If the instruction were error, it was harmless beyond a reasonable doubt in the face of Aguilar's admissions of knowledge.[10]

D. Burden of Proof

Aguilar next argues that the jury instructions on knowledge unconstitutionally shifted the burden of proof onto him in violation of due process. Aguilar first raised his constitutional objection to the court's "knowledge" instruction in his motion for a new trial. When there is no objection to a jury instruction at trial, this Court reviews the instruction for plain error. *United States v. Bustillo,* 789 F.2d 1364, 1367 (9th Cir.1986). "A plain error is a

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[10] The dissent finds a serious factual question as to what Aguilar knew and what he merely suspected. *Post* at 635. It is impossible for a jury to know the strength of certainty with which a belief is held, which may run the continuum from doubt to suspicion to belief to certainty, except by what is manifested objectively. I do not believe the jury was required to disbelieve what Aguilar *said* he knew and find that he could not actually have known it. Judge Aguilar's contention that Aguilar could not have known a fact that did not exist, *see post* at 635-36, suggests that his concern is not with the knowledge instruction; rather, it is with the notion that Aguilar's crime is a factual impossibility. When disclosure of actual surveillance efforts occurs, the specific intent to frustrate surveillance efforts exists, and there is subjective belief in the existence of attendant circumstances that makes the conduct and intent criminal, any error as to that belief does not relieve the act of its culpability. Thus the drug dealer who sells soap powder mistakenly "knowing" it to be heroin is guilty. *See Quijada,* 588 F.2d at 1255 (citing *United States v. Roman,* 356 F.Supp. 434, 438 (S.D.N.Y.), *aff'd,* 484 F.2d 1271 (2d Cir. 1973), *cert. denied,* 415 U.S. 978, 94 S.Ct. 1565, 39 L.Ed.2d 874 (1974)).

highly prejudicial error affecting substantial rights." *Id.*

In *Sandstrom v. Montana,* 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), the Supreme Court held that a jury instruction stating that " 'the law presumes that a person intends the ordinary consequences of his voluntary acts,' violates the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt." *Id.* at 512, 99 S.Ct. at 2453. A jury could interpet such an instruction as shifting the burden of proof to the defendant. *Id.* at 524, 99 S.Ct. at 2459.

Aguilar argues that the last clause of the trial court's instruction on "knowledge" had the same effect as the instruction in *Sandstrom.* The district court instructed the jury that

> [k]nowledge of the evidence of a particular circumstance may be satisfied by proof that the defendant was aware of a high probability of the existence of that circumstance[,] *unless you find from the evidence that the defendant actually believed that the circumstance did not exist.*

(emphasis added).

In *Esquer-Gomez,* we held that the "balancing clause" of the Model Penal Code definition is necessary to protect the defendant against the risk that he will be convicted for what he "should have known." *See* 550 F.2d at 1235-36. In *United States v. Hogg,* 670 F.2d 1358 (4th Cir.1982), however, the Fourth Circuit held that a nearly identical instruction violated *Sandstrom.* That court concluded that a reasonable jury could interpret the instruction to mean that "once the government shows that the defendants knew [the circumstance] probably existed, the defendants must introduce more than some evidence that they had no actual knowledge to avoid a finding against them on this element." *Id.* at 1363-64. It held that

Sandstrom "prohibits such a persuasion-shifting instruction." *Id.* at 1364.

I disagree that the reasoning of *Sandstrom* supports the holding of *Hogg*. In *Sandstrom,* the Court found that an instruction that the law presumes a person to intend the consequences of his acts could have shifted the burden of proof on the element of intent to the defendant: The jury "could have concluded that upon proof by the State of the slaying, and of additional facts not themselves establishing the element of intent, the burden was shifted to the defendant to prove that he lacked the requisite mental state." 442 U.S. at 524, 99 S.Ct. at 2459.

The instruction given in this case could have no such effect because it did not create a presumption that the defendant had to overcome. The function of the balancing clause is to ensure that the jury does not hold the defendant responsible for what a reasonable person would know, if in fact the defendant actually believed the fact did not exist. It directs the jury to focus on the defendant's actual belief, nothing more. The clause does not imply anything about whose burden it is to prove the defendant's state of mind. Here, the district court stated unequivocally that the government had to prove that Aguilar was aware of a high probability that the wiretap application existed. The balancing clause in no way lightened that burden.

Furthermore, even if the instruction itself were faulty, which I believe is not so, we do not consider jury instructions in isolation, but rather in the context of the other instructions given. *Maddox v. City of Los Angeles,* 792 F.2d 1408, 1412 (9th Cir.1986). We have held that reminders that the government has the burden of proving every element of the crime beyond a reasonable doubt are sufficient to cure instructions that might otherwise shift the burden of proof. *See United States v. Wyatt,* 807 F.2d

1480, 1481-82 (9th Cir.), *cert. denied,* 484 U.S. 858, 108 S.Ct. 170, 98 L.Ed.2d 124 (1987). Considered in context, the knowledge instruction hardly could have led a reasonable juror to conclude that Judge Aguilar had the burden of proving his lack of knowledge. The jury was reminded repeatedly that the government was required to prove every element of the offense beyond a reasonable doubt. And, as we have said, the evidence of Judge Aguilar's knowledge, coming as it did from his own mouth, was overwhelming. Because the jury was cautioned about the government's burden, and because the evidence was so weighty, the instruction could not have been "highly prejudicial" and therefore was not plain error.

For the foregoing reasons, I would reject each of Judge Aguilar's objections to his conviction under section 2232(c); moreover, we conclude that any possible error was harmless beyond a reasonable doubt. *See post* at 641 (O'Scannlain, J., concurring).

III

OBSTRUCTION OF JUSTICE

The judicial obstruction statute, 18 U.S.C. § 1503,[11] also contains a "knowledge" component. Though the text of the statute prescribes no scienter requirement, this circuit has held that knowledge of a judicial proceeding is an element of a section 1503 offense. *See United States v. Washington Water Power Co.,* 793 F.2d 1079, 1084 (9th Cir. 1986); *United States v. Rasheed,* 663 F.2d 843, 852

[11] Whoever . . . corruptly or by threats or force, or by any threatening letter or communication . . . endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1503 (1988).

(9th Cir. 1981), *cert. denied,* 454 U.S. 1157, 102 S.Ct. 1031, 71 L.Ed.2d 315 (1982). The trial court, therefore, instructed the jury that "there must be knowledge of the existence of a judicial proceeding before a defendant can be convicted of this offense." It then defined knowledge in precisely the same terms it had used in the wiretap instruction.

Aguilar challenges his conviction under section 1503 on the ground that the evidence was insufficient to show that he had knowledge that the FBI agents to whom he lied would be witnesses before a grand jury. He also raises the same objections to the court's instruction on "knowledge" that he raised with respect to section 2232(c). For the same reasons that I would hold that the instruction on the "knowledge" element of section 2232(c) properly defined knowledge and did not violate due process, I would hold that the instruction on the knowledge element of section 1503 was also proper. A majority of this panel having concluded otherwise, a decision from which I respectfully dissent, this conviction will be reversed and we do not reach the question of the sufficiency of the evidence. Were it necessary to do so, I would also hold there was sufficient evidence for a rational jury to find Aguilar knew that FBI agent Carlon was expected to be a witness in front of the grand jury. Judge Aguilar clearly knew that a grand jury was meeting, he repeatedly questioned the agents about whether he was a target, and he testified about how grand jury investigations operate, which demonstrated to the jury his ability to correctly determine both his own status and the purpose of the interview. A reasonable jury could have found that a federal judge, sophisticated on the subject of grand jury investigations, who knew that a grand jury was in session and who "was aware of a high probability" that he was a target of its investigation, also knew that Agent Carlon would be expected to testify before the

grand jury about Aguilar's statements to him. I therefore would uphold Aguilar's conviction for violating section 1503.

IV

DEPARTURE FROM THE SENTENCING GUIDELINES

We agree that at a minimum, the district court failed to provide a reasoned explanation for its six-level downward departure, and I concur in Judge O'Scannlain's opinion to that extent. I most vigorously dissent, however, from the conclusion that the district court had the legal authority to depart downward on the basis it did.

The mitigating circumstance upon which the district court based its downward departure was the "additional punishment" it anticipated Judge Aguilar would suffer during the course of potential disbarment and impeachment hearings. The plurality acknowledges that the Guidelines account for impeachment, but concludes that the Guidelines do not account for "the likelihood that Judge Aguilar will suffer additional punishment throughout the course of several disciplinary hearings." *Post* at 643-44 (O'Scannlain, J., concurring). The plurality then concludes that the district court had legal authority to depart on this basis, a conclusion I find insupportable.

First, and most fundamentally, departures prompted by the substantial pain and humiliation or financial hardship those in high places suffer when they break the law is inconsistent with the Guidelines' policy that disparity in sentencing should never be occasioned by socio-economic status. *See* 28 U.S.C. § 994(d) (1988); U.S.S.G. Ch. 1 Pt. A 4(b) & § 5H1.10.[12] The district court emphasized that

[12] Where most defendant characteristics are deemed "not ordinarily relevant," socio-economic status is flatly "not relevant." Thus,

its willingness to depart "is limited only to those features that I believe are so different and unique with this defendant." It concluded that these features would be "so extensive and so enduring" that they formed an appropriate basis for departure. But there is no escaping the conclusion that the court's departure was grounded in the notion that the consequences that accrue when someone who holds a position of high esteem and importance violates the law are uniquely significant and harsh. Though the court recognized that collateral consequences arising from a criminal defendant's social and professional stature are inappropriate bases for departure, it did not seem to realize that its departure was grounded in precisely such considerations. With respect, I must say that a plurality of this panel now makes the same error.

Second, the circumstance upon which the district court based its departure is, regretfully, not all that unique. The Sentencing Guidelines' policy statement on departures states that courts should depart only in the "atypical" case. *See* U.S.S.G. Ch. 1, Pt. A 4(b); *cf. United States v.*

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although some offender characteristics may be taken into account where not adequately considered by the Guidelines, socio-economic status is not one of these. The plurality's suggestion to the contrary is troubling. *See post* at 627 n. 2. To the extent that *United States v. Valdez-Gonzalez*, 957 F.2d 643 (9th Cir. 1992), stands for the proposition that a court may consider socio-economic "factors," as opposed to "status," it should be noted that (1) the "factors" considered therein were "the socioeconomics and the internal politics of the drug trade along the Mexican border," 957 F.2d at 649, not factors unique to the defendants' personal situations; (2) the court looked to socioeconomic factors *not* as a basis for departure, but in evaluating an otherwise permissible factor (role in the offense); and (3) the departures were at least consistent with the Guidelines, paralleling downward adjustments the defendants would have received under section 3B1.2 had the other participants in their crimes been indicted. *See* 957 F.2d at 648. *Valdez-Gonzalez* is surely no support for the result in this case.

Anders, 956 F.2d 907, 912 (9th Cir. 1992) (factors "not ordinarily relevant" may be considered only in "extraordinary circumstances"), *cert. denied*, ____ U.S. ____, 113 S.Ct. 1592, 123 L.Ed.2d 158 (1993). The kind of additional humiliation and suffering Judge Aguilar will suffer, while not common, is not "atypical." The district court's reasoning would apply to many well-known figures in the worlds of government and finance who have been prosecuted over the last twenty years. I cannot accept the notion that the humiliation of disbarment or impeachment proceedings is different in kind or degree from the humiliation, shame and stigma borne by numerous other respected community members convicted of serious crimes.[13]

No one disputes that Judge Aguilar's job accounts for the collateral consequences he now faces in the form of "long, humiliating, and burdensome" proceedings of disbarment and impeachment, as well as loss of pension benefits and preclusion from public service. *See post* at 643-44.[14] The plurality finds this permissible, however, because a departure on the basis of Judge Aguilar's job is not based on the judge's "status in society." *Id.* The plurality's own support refutes this notion: "the phrase 'socio-economic status' refers to an individual's status in society as determined by objective criteria such as education, income, *and employment*." *United States v. Lopez*, 938 F.2d 1293, 1297 (D.C.Cir. 1991) (emphasis added). In

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[13] Nor can I accept the plurality's implication that Judge Aguilar's suffering is rendered unique by his status as an "Article III" judge. Whether Aguilar is a federal, state, municipal, or traffic court judge is irrelevant and does not render his circumstances "atypical."

[14] The plurality characterizes this as "extra punishment," *post* at 644, and perhaps rightfully so. But it is a far cry from solitary confinement in prison, the only instance of extra punishment held to warrant downward departure. *See United States v. Lara*, 905 F.2d 599 (2d Cir. 1990).

our society, rightly or wrongly, one's job is often equivalent to one's status in society. What is more, the plurality buttresses its conclusion that departure on the basis of Aguilar's job is permissible on the additional basis that Judge Aguilar stands to lose his pension too. *See post* at 644-45. How one could assert that financial ramifications of conviction is not a socio-economic factor is beyond comprehension.

A criminal conviction may mean a loss of current position and foreclosure of future professions or positions for many defendants. Professionals in the securities industry, once convicted of violating the securities laws, lose their brokers' licenses in quasi-judicial proceedings not unlike disbarment, and thereafter are barred from holding certain positions in the securities industry. *See* 15 U.S.C. § 78*o*(a), (b)(4) (1988). Likewise, persons convicted of certain offenses are barred from holding positions within a labor union or pension plan, *see* 29 U.S.C. §§ 504(a), 1111 (1988)—ironically, the genesis of Rudy Tham's solicitation of Judge Aguilar's influence and this case. I doubt any court would support a downward departure for a securities broker convicted of insider trading violations on the ground that she faced a burdensome civil liability proceeding, stood to lose her broker's license, would be barred from registering as a securities broker or dealer in the future, had to disgorge her profits, and suffered extreme public humiliation as she was drummed out of Wall Street. I cannot see that Judge Aguilar's position is so different.

The Guidelines' policy is that "persons who abuse their positions of trust . . . generally are viewed as more culpable." U.S.S.G. § 3B1.3 comment. (backg'd). We must assume that the Sentencing Commission has adequately considered the special circumstances of defendants who hold high office, and rejected any notion that such persons should receive more lenient treatment. The district court's

departure on the basis of consequences flowing from Judge Aguilar's breach of the public trust flies in the face of the Guidelines' policy. Collateral consequences of conviction arising from or affecting one's job simply are not a permissible basis for departure. *See United States v. Rutana*, 932 F.2d 1155, 1158-59 (6th Cir.), *cert. denied*, ____ U.S. ____, 112 S.Ct. 300, 116 L.Ed.2d 243 (1991).

"A long course of adversarial proceedings" awaits many a defendant following criminal conviction—be they forfeiture proceedings, civil suits seeking tort damages, or administrative proceedings to revoke professional licenses. These suits are burdensome in themselves, and their consequences can be exceedingly onerous. Defendants can lose their homes, investments, businesses, and entire estates in forfeiture proceedings following conviction of drug or racketeering offenses, or can be hit with staggering civil damage awards for many white collar crimes. Judge Aguilar's potential forfeiture of his pension rights is no different. Personal financial hardship is not a permissible basis for downward departure. U.S.S.G. § 5K2.12.

The plurality's statement that the 'extra punishment' Judge Aguilar faces "can be distinguished" from other collateral effects arising from conviction, *see post* at 644 n. 3, is not convincing. First, the plurality addresses only deportation; the collateral effects more comparable to what Judge Aguilar faces are personal financial hardship and foreclosure of career opportunities. I submit that despite the fact that deportation "is not considered punitive," its "undeniable impact" is far more punitive than mere loss of position. For that matter, disbarment is not considered punitive either:

> It must be noted that although the word 'punishment' is frequently used, the discipline of an attorney is not punitive in character. . . . The purpose of such a pro-

> ceeding is to determine the fitness of an officer of the court to continue in that capacity, and it has been said the disbarment of attorneys is not intended for the punishment of the individual, but for the protection of the courts and the legal profession.

Marsh v. State Bar, 2 Cal.2d 75, 39 P.2d 403, 405 (1934); *accord In re Lavine,* 126 F.Supp. 39, 48 (S.D.Cal. 1954), *rev'd on other grounds,* 217 F.2d 190 (9th Cir. 1954); *United States ex rel. Fitzgerald v. Stump,* 112 F.Supp. 236, 237 (D.Alaska 1953).

Second, because deportation is a normal collateral consequence of conviction for a drug offense, the plurality assumes the Sentencing Commission adequately considered it in determining the appropriate offense level for drug crimes. Apart from the fact that this logic is fallacious—the offense levels for drug convictions were set for aliens and citizens alike, so the consequence of deportation could not possibly be reflected in the offense level for drug crimes—the same reasoning would apply here: disbarment as a consequence of a serious criminal conviction is not rare, and indeed ought to follow as a matter of course. *In re Quimby,* 359 F.2d 257, 258 (D.C.Cir. 1966) (per curiam). Accordingly, by the plurality's logic, we should assume the Sentencing Commission adequately allowed for that circumstance in determining offense levels.

Of course, we need not rely on fictional assumptions since the Commission expressly considered the factors upon which the district court seeks to depart—and pronounced each of them either irrelevant, *see* U.S.S.G. §§ 5H1.10 (socio-economic status), 5H1.11 (public service), or a basis for *harsher* treatment, *cf. id.* §§ 3B1.3 (court must adjust upward for abuse of position of trust); 5E1.4 (court must impose forfeiture upon convicted defendant as provided by law).

In short, I see no meaningful distinction, either qualitative or quantitative, between the additional "punishment" Judge Aguilar faces and that suffered by hundreds of convicted criminals. The plurality states that Judge Aguilar's case "does not appear to fall within the heartland of cases for which the Guidelines were designed." *Post* at 645. Judge Aguilar's *case*—his conduct and offense of conviction—is not at issue here. What the plurality of course means is that Judge Aguilar's personal circumstances are not those of the average defendant, and because of those circumstances, the Guideline sentence for Judge Aguilar's offense appears unduly harsh. That assessment is equally true for hundreds of decent and sympathetic defendants now serving time in federal prisons. The response to this severity cannot take the form of special justice simply because Judge Aguilar is "the first convicted federal judge" upon whom it will be visited.

> When a high-ranking member of the judiciary, especially a respected and popular judge, is arrested for a serious crime, the entire judicial system is placed on trial. The world waits to see if judges can judge other judges fairly and equally.

Alan M. Dershowitz, *Justice on Trial,* N.Y. Times, Nov. 18, 1992, at A27. No judge can be treated more leniently than would a non-judicial defendant in a comparable case. To accord Judge Aguilar special consideration on the basis of his position is to violate the fundamental premise not only of the Guidelines, but of this nation: equal justice for all.

The circumstance upon which the court based its departure was inconsistent with the rules and policies of the Sentencing Guidelines and therefore in violation of 18 U.S.C. § 3553(b) as interpreted by this Court in *Lira-*

Barraza.[15] I would hold that the district court, on remand, may not depart downward on the basis of consequences stemming from Aguilar's judicial position.[16]

Conclusion

In sum, we hold that the evidence was sufficient for a rational jury to find that Judge Aguilar had knowledge of the wiretap, and that the use of section 2232(c) to punish Judge Aguilar for disclosing the wiretap did not violate his rights under the First Amendment. Judge Aguilar's conviction for violating 18 U.S.C. § 2232(c) is therefore AFFIRMED. I would also hold that the jury instruction did not misstate the "knowledge" element of section 2232(c) and that the instruction did not unconstitutionally shift the burden of proof.

I would also hold that the evidence was sufficient for a rational jury to find Judge Aguilar had knowledge that Agent Carlon would be a witness before the grand jury, that the jury instruction did not misstate the "knowledge" element of section 1503, and that the instruction did not unconstitutionally shift the burden of proof. I therefore respectfully dissent from the panel's decision that Judge Aguilar's conviction for violating 18 U.S.C. § 1503 must be REVERSED.

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[15] Even if I were to conclude that it were permissible for the court to depart, I doubt that a *six* level downward departure was justifiable. A district court must consider the validity of *each* level of departure. *See Lira-Barraza*, 941 F.2d at 748. The court must also provide a statement explaining and justifying the departure. *See id.* at 751. The district court jumped six levels without explanation. It is difficult to imagine how such an extensive departure could be justified by reference to the structure of the Guidelines.

[16] I do not find it troubling that a more severe sentence should be imposed on remand despite the reversal of one count of conviction. This results from the district court's failure to comply with the Guidelines in the first instance.

On the government's cross appeal, we hold that the district court failed to include a reasoned explanation of the extent of its departure as required by *Lira-Barraza*. Judge Aguilar's sentence is therefore VACATED and the case is REMANDED to the district court for resentencing. I would also hold that the district court lacked authority to depart downward from the offense level prescribed by the Sentencing Guidelines based on the additional "punishment" awaiting Aguilar. I most vigorously dissent from the panel's contrary decision.

See p. 626 for dissent by Judge Hug and special concurrence by Judge O'Scannlain.

HUG, Circuit Judge, dissenting, but concurring in Part II of Judge O'SCANNLAIN'S opinion.[1]

I respectfully dissent. It is important to keep in mind that Judge Aguilar was acquitted of the charge that was the major focus of this trial—the charge of conspiracy to influence Judge Weigel concerning a case pending in his court. Judge Aguilar was convicted of two peripheral charges that, in my opinion, cannot be sustained. The statutes that form the basis for these charges have to be stretched far beyond their intended application to be made applicable to the facts of this case. I would reverse both charges on the ground of insufficiency of the evidence because the facts of this case, viewed in the light most favorable to the Government, simply do not meet the statutory requirements for conviction.

Moreover, I would reverse both convictions, even if the evidence were deemed to be sufficient, on the ground that

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[1] Because I am convinced that the convictions on both counts should be reversed, I conclude that there should be no sentence at all. However, the combined opinions of Judge Hall and Judge O'Scannlain affirm the conviction on Count Six. I am thus required to rule on the sentencing issue. I concur in Part II of Judge O'Scannlain's opinion.

the district judge gave an erroneous knowledge instruction. Knowledge of certain essential facts was an element of both of the crimes of which Judge Aguilar was convicted. The instruction on knowledge that was given by the court permitted the jury to convict on a finding that there was a "high probability" that Judge Aguilar knew the crucial facts, rather than that he was actually aware of the crucial facts. This is a serious departure from the prcedent in our circuit on the requirement of knowledge. The instruction given was one that is intended for a case where a "deliberate blindness" instruction is justified. We have carefully circumscribed the situation in which such an instruction can be given. Primarily, the instruction has been used in drug or alien smuggling cases, where the facts justify a finding that there was a high probability that the defendant knew what was going on and deliberately chose not to find out. Thus, the defendant was maintaining a "deliberate blindness," sometimes designated as a "deliberate ignorance." There are no facts that justify such a finding in this case. The Government does not even contend that this is a "deliberate blindness" case. Rather, the Government contends, and Judge Hall's opinion accepts the proposition, that this "high probability" instruction is an appropriate definition of knowledge in all cases.

This erroneous instruction to the jury on an essential element of both crimes cannot be overlooked as being harmless beyond a reasonable doubt. There was clearly a genuine factual issue as to whether Judge Aguilar had the requisite knowledge in each count. Whether the jury was required to find that Judge Aguilar *knew* of the existence of the essential facts or was *only aware of the high probability* of their existence could make a crucial difference. The error was not harmless.[2]

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[2] When the three separate opinions of this panel are combined, it develops that the conviction on Count Eight for obstruction of justice is reversed, and the conviction on Count Six for wiretap disclosure is affirmed. Although Judge O'Scannlain and I conclude that the knowledge instruction incorrectly stated the law, Judge Hall and Judge O'Scannlain conclude that the error is harmless beyond a reasonable doubt. The conviction on Count Six, therefore, hangs on the harmless error determination, which I discuss in Part II D.

I. *FACTS*

Because Judge Aguilar was acquitted of the main charge of conspiracy to influence Judge Weigel, it is fair to view the facts related to this charge from Judge Aguilar's perspective, as the jury apparently did.

Abe Chapman is related to the Aguilar family by marriage. He is the step-grandfather of Judge Aguilar's nephew, Steve Aguilar. Although Judge Hall's opinion describes Abe Chapman in sinister tones, from Judge Aguilar's perspective he was an alcoholic, semi-senile 83-year-old man whom the family often referred to as "Mr. Magoo."

Chapman wanted to help his friend Rudy Tham, who had been a labor leader, had been convicted of embezzling $2,000, had served six months, and was then on supervised release. Tham sought to overturn his conviction in a 28 U.S.C. § 2255 proceeding so that he could resume his position as an officer of the local union that he had formed and organized. Chapman and Tham's attorney, Edward Solomon, sought Judge Aguilar's help. Chapman and Solomon wanted Judge Aguilar to attempt to improperly influence Judge Weigel in his ruling on this section 2255 petition. However, the jury found that Judge Aguilar did not do so and did not ever agree to do so. Judge Weigel, a highly respected senior district judge, firmly testified that Judge Aguilar made no attempt to influence him in the *Tham* case.

Judge Aguilar testified:

> In a 2255 petition or other petition, you talk about the procedural matters, how to get the matter to court. And that's what I was talking about with them, about how to get this vehicle to court and how to get this matter before the judge, and I never discussed with them at any time the merits of the case. I wasn't concerned with the merits of the case. My concern was only helping them on what they should do procedurally.

There is no doubt that Judge Aguilar should not have put himself in the position of giving legal advice in a case pending before a fellow district judge. This is inappropriate for a judge and may well be a violation of judicial ethics, but it is not a crime. As the jury acquitted Judge Aguilar of the conspiracy charge, it was obviously satisfied with this explanation.

Judge Aguilar also was acquitted of the charge that he obstructed justice by trying to influence Solomon to testify falsely before a grand jury. It is important to note that the evidence related to this charge, quoted in Judge Hall's opinion, must be viewed in the light that Judge Aguilar was acquitted of this charge.

The foregoing discussion is intended to allow me to focus on the specific facts of the charges of which Judge Aguilar was convicted, without our decision being colored by the facts of the charges of which he was acquitted. I now turn to the specific charges of which Judge Aguilar was convicted and the facts involved in those charges.

II. *WIRETAP CHARGE*

A. *Summary of Reasons for Reversal*

As previously mentioned, there are two reasons why the wiretap charge under 18 U.S.C. § 2232(c) (1988) cannot be sustained. The first is the insufficiency of the evidence under the statute as it must properly be interpreted. The second is that knowledge of certain facts is a central element of the crime, and the court's instruction defining knowledge was erroneous and was not harmless error.

Before I embark upon a detailed analysis of the statute and the facts, a summary of the reasons why the evidence is insufficient to sustain the conviction on this charge may be helpful. It is not a crime under section 2232(c) to notify someone that you suspect that your telephone or his telephone is being tapped or that he might be intercepted on someone else's telephone tap. In order for there to be a violation of section 2232(c), a person must have knowledge of an authorization or application for an authorization to intercept a wire communication and then give notice or attempt to give notice to someone to impede *such interception*. Judge Aguilar was charged with giving notice of an application for an authorization to intercept a wire communication. In order for the statute to apply, the interception allegedly impeded had to be one authorized as a result of that application—otherwise it could not qualify as "such interception." Thus, Judge Aguilar's viewing on February 6, 1988 of an FBI agent's surveillance of Chapman entering and leaving Judge Aguilar's house and his subsequent warning that phones might be tapped, could not constitute a violation of the statute. It is only if the notification can be tied to Judge Peckham's conversation, six months before, that the statute conceivably could be violated.

In her discussion of section 2232(c), Judge Hall completely omits the statute's specific reference to "such interception." *See* Judge Hall's opinion at 614. Judge Hall states that "[t]he statute imposes liability on any one 'having knowledge that a Federal investigative or law enforcement officer *has been authorized or has applied* for authorization' to conduct a wiretap." *Id.* However, the statute must be read in its entirety; the statute imposes liability on anyone "having knowledge that a Federal investigative or law enforcement officer has been authorized or has applied for authorization . . . *in order to obstruct, impede or prevent such interception.*" *See* 18 U.S.C. § 2232(c) (emphasis added).

Judge Peckham's purpose in mentioning the wiretap to Judge Aguilar was simply to let Judge Aguilar know that it might not be wise for Judge Aguilar to be associating with Chapman because of an appearance of impropriety. He stated that Chapman's name had come up in connection with an application for a wiretap authorization and that he had, as an Assistant United States Attorney, prosecuted Chapman many years earlier on a criminal charge. The application that Judge Peckham referred to was an application to tap the telephone of Rudy Tham. This application resulted in an authorization to tap Tham's telephone from April 20, 1987 to May 20, 1987. The authorization, resulting from the application, had long since expired by the time Judge Peckham spoke to Judge Aguilar. Even assuming that the information Judge Peckham conveyed to Judge Aguilar was sufficient to give Judge Aguilar knowledge that Chapman was an authorized interceptee, there was no way in which the interception authorized as a result of that application could have been impeded by any notification to Chapman. The authorization had expired. It is all the more clear that eight months thereafter any

notification to Chapman could not have violated the statute.

It is only if the statute could be stretched to mean that once an application for authorization to wiretap was filed, notification at any time thereafter would be a violation, that Judge Aguilar's conviction could be upheld. This is a misconstruction of the statute. An application ends with the granting or the denying of an authorization. If the authorization is denied, there can be no interception resulting. If the authorization is granted, the authorization terminates in 30 days. Any new authorization or extension requires a new application. *See* 18 U.S.C. § 2518(5) (1988).

The Government and the opinions of Judge Hall and Judge O'Scannlain seek to avoid this problem by focusing on whether Judge Aguilar knew on February 6, 1988 that there was a wiretap on Chapman's telephone. This would have entailed a new application and authorization. Whether Judge Aguilar "knew" or merely "suspected" that there was a new application and authorization presents a serious factual issue for the jury. The erroneous instruction equating "high probability" with "knowledge" could not be a harmless error. There is a critical distinction between the two concepts.

B. ***Insufficiency of the Evidence***

With this general introduction, I will explain in more detail why the evidence is insufficient to convict under section 2232(c). Judge Aguilar was convicted of Count Six, which charged the following:

> On or about February 6, 1988, in the Northern District of California, defendant, Robert P. Aguilar while a United States District Judge, having knowledge that a Federal investigative officer had applied to the United States District Court for the

> Northern District of California for authorization to intercept wire communications of Abe Chapman, and in order to obstruct, impede, and prevent such interception, gave notice and attempted to give notice of the possible interception to Abe Chapman. In violation of Title 18, United States Code, Section 2232(c).

Judge Aguilar argues that there was insufficient evidence to convict him of this count. I agree.

Section 2232(c) provides in part:

> *Notice of Certain Electronic Surveillance.* – Whoever, having knowledge that a Federal investigative or law enforcement officer has been authorized or has applied for authorization under chapter 119 to intercept a wire, oral, or electronic communication, in order to obstruct, impede, or prevent *such interception,* gives notice or attempts to give notice of the possible interception to any person shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 2232(c) (emphasis added).

This language requires a pending application for authorization or an authorization that has not expired. The Government argues that, under section 2232(c), it is sufficient if, at some time in the past, there was a wiretap application; it does not matter, under the Government's theory, if the wiretap application has already been denied or if authorization has been granted but has already expired. This is not a reasonable construction of the statute.

The plain language of the statute makes it clear that the purpose of the statute is to prevent interference with "possible interception." It is possible that disclosure of an existing wiretap can lead to interference with interception. It also is possible that disclosure of a pending wiretap application, if the application is subsequently authorized, can lead to interference with interception. However, disclosure of an application that already has been denied, or whose authorization already has expired, cannot possibly interfere with "such interception." The language, "such interception," shows that the statute pertains to the particular application or authorization of which the defendant has knowledge. The defendant must intend to impede an interception from the specific application or authorization of which he has knowledge.

The statute's requirement of knowledge of *either* wiretap applications *or* wiretap authorizations further demonstrates that the statute applies only to *pending* applications and *unexpired* authorizations. If Congress was concerned with the disclosure of wiretap applications even when the applications were no longer pending, it would have been unnecessary to include any language about authorizations; there is never an authorization without an application. There is no indication in the statute that Congress was concerned with *expired* authorizations, regardless of whether they are the subject of secrecy orders.

Section 2232(c), read with the language essential to this charge, is as follows:

> Whoever having knowledge that a Federal . . . officer . . . has applied for . . . authorization . . . to intercept a wire . . . communciation in order to obstruct . . . *such interception* gives notice or attempts to give notice of the possible interception to any person shall be fined . . . or imprisoned. . . .

(Emphasis added.)

I conclude that the statutory language is quite clearly directed to disclosure of a wiretap that could possibly result from the application of which the defendant has

knowledge—not from some later application, which would require a completely new justification under 18 U.S.C. § 2518(5) (1988). At the very least, this is a reasonable construction of the statute. Judge Hall's opinion arrives at a different construction and rejects this construction. *See* Judge Hall's opinion at 615. In my opinion, Judge Hall's construction is an unwarranted expansion of the statutory language, and one which ignores the crucial phrase "such interception." However, even if Judge Hall's interpretation were possible because of some ambiguity, the more lenient construction is required. To reject a reasonable construction of a statute is incompatible with the rule of lenity. "In interpreting the substantive ambit of criminal prohibitions, ambiguities must be resolved in favor of the criminal defendant." *United States v. Baxley,* 982 F.2d 1265, 1270 (9th Cir. 1992); *see United States v. Batchelder,* 442 U.S. 114, 121, 99 S.Ct. 2198, 2202, 60 L.Ed.2d 755 (1979); *Simpson v. United States,* 435 U.S. 6, 14, 98 S.Ct. 909, 913, 55 L.Ed.2d 70 (1978). I find the plain language of the statute to be clear, but even if it were possible to wring Judge Hall's construction out of some ambiguity in the statute, it would violate the rule of lenity to do so.

Furthermore, there is no indication that "the statute's primary concern is with the giving of notice with specific intent to interfere with surveillance" in general, as Judge Hall contends. *See* Judge Hall's opinion at 615. The statute does not impose liability on a defendant who interferes with "any future surveillance" or "any future wiretap." Rather, it imposes liability on a defendant who has knowledge of a particular wiretap application or authorization and who gives another person notice of "*the* possible intereception" in an effort to obstruct "*such* interception." *See* 18 U.S.C. § 2232(c). Judge Hall's expan-

sive interpretation ignores the plain language of the statute.

First Amendment concerns also convince me that section 2232(c) cannot be construed to punish disclosure of all applications regardless of whether the applications are still pending. Statutes must be construed, if at all possible, to avoid constitutional problems. *See Blitz v. Donovan,* 740 F.2d 1241, 1244 (D.C.Cir.1984). The Government may regulate speech in order to promote a compelling state interest if it employs the least restrictive means to further that interest. *Sable Communications of California, Inc. v. FCC,* 492 U.S. 115, 126, 109 S.Ct. 2829, 2836, 106 L.Ed.2d 93 (1989). The Government does not have a compelling interest in prohibiting the disclosure of *all* wiretap applications because in many cases there is no danger of interference with a wiretap. The statute, as the Government interprets it, would punish constitutionally protected speech as well as constitutionally unprotected speech. The statute would therefore be overbroad and void on its face. *See Clark v. City of Los Angeles,* 650 F.2d 1033, 1039 (9th Cir.1981) ("overbreadth doctrine holds that a law is void on its face if it sweeps within its ambit not solely activity that is subject to governmental control, but also includes within its prohibition the practice of a protected constitutional right"), *cert denied,* 456 U.S. 927, 102 S.Ct. 1974, 72 L.Ed.2d 443 (1982). Thus, to avoid this constitutional problem, we must construe the statute to prohibit the disclosure of *pending* applications and *unexpired* authorizations only.

The Government admits that the statute is "explicitly directed at those who disclose the existence of the wiretap in order to impede interceptions." Nevertheless, the Government argues that the existence of a wiretap or pending application is unnecessary because the statute

criminalizes attempts. Thus, the Government maintains, an attempted notification is sufficient for a conviction even if the defendant erroneously believes that there is a pending wiretap application or authorization, whereas in actuality no such application or authorization exists.

Section 2232(c) is not a classic attempt statute. The classic attempt statute crimnalizes an attempt to violate *another* statute or *another* statutory subsection. *See, e.g.*, 18 U.S.C. § 1113 (1988) (criminalizing an attempt to commit murder or manslaughter; murder criminalized by 18 U.S.C. § 1111 (1988) and manslaughter criminalized by 18 U.S.C. § 1112 (1988)); 18 U.S.C. § 1201(d) (1988) (criminalizing an attempt to violate 18 U.S.C. § 1201(a)(4) (1988), which prohibits the kidnapping of foreign officials). There is not a statute that criminalizes attempts to violate section 2232(c), and section 2232(c) does not criminalize an attempt to violate another statute or statutory subsection.

Section 2232(c) itself punishes someone who "gives notice *or attempts* to give notice" of possible interception. (Emphasis added.) Therefore, we must examine the language of section 2232(c) to discover whether an erroneous belief that there is a wiretap application is sufficient for conviction. A reading of the statute demonstrates that the word "attempt" modifies only the words "to give notice." There is no modification of the language that requires "*knowledge* that a Federal investigative or law enforcement officer has been authorized or has applied for authorization" to tap someone. (Emphasis added.) Therefore, regardless of whether the defendant notifies or attempts to notify someone of possible interception, the

defendant must have knowledge of the pending wiretap application or authorization.[3]

The only application about which Judge Aguilar arguably could have had any knowledge was the application mentioned by Judge Peckham. This application had resulted in the authorization to tap Rudy Tham's telephone and had expired by the time Judge Peckham spoke to Judge Aguilar. Therefore, there was no possibility that Judge Aguilar by any notification could have impeded an interception authorized as a result of that application.

C. *Knowledge Instruction*

[8] Even if we accept the Government's view that the knowledge required is that there was in the past an application, and that after observing the FBI's surveillance, Judge Aguilar put "two-and-two together" and therefore "knew" that wires were being tapped, and that Chapman was designated as an authorized interceptee, the erroneous knowledge instruction requires reversal.

The district court gave the following instruction defining knowledge:

> Knowledge of a fact, members of the jury, means that you're satisfied from the evidence that he knew it[.]

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[3] Section 472 of Title 18 provides a fitting analogy. Section 472 punishes a person who "passes, utters, publishes, or sells, or *attempts* to pass, utter, publish, or sell" counterfeited obligations or securities. 18 U.S.C. § 472 (1988) (emphasis added). To be convicted of passing counterfeit money, the defendant must know that the money is counterfeit. *United States v. Palacios*, 835 F.2d 230, 232 (9th Cir. 1987). In addition, to be convicted of *attempting* to pass a counterfeit bill, the defendant must know that the bill is counterfeit. *See United States v. Lacey*, 459 F.2d 86, 88-89 (2d Cir. 1972). Thus, the attempt language in section 472 does not eliminate the knowledge element of the crime.

> Or knowledge of the existence of a particular circumstance may be satisfied be proof that the defendant *was aware of a high probability of the existence of that circumstance*[,] *unless you find from the evidence that the defendant actually believed that the circumstance did not exist.*

(Emphasis added.)

This instruction was erroneous. There is clearly a difference between knowledge and an awareness of a high probability that a circumstance exists. A person knows of a circumstance if he or she is aware of that circumstance.

The Model Jury Instruction for the Ninth Circuit instructs that "[a]n act is done knowingly if the defendant is *aware* of the act and does not act [or fail to act] through ignorance, mistake, or accident." Model Jury Instruction 5.06 (1992) (emphasis added).[4] If awareness is knowledge, when a person is aware of a high probability that a circumstance exists, then what the person "knows" is that there is *a high probability* that the circumstance exists. Knowledge that there is a high probability that a circumstance exists cannot be equated, however, with knowledge that the circumstance itself exists. Futhermore, one can be aware of a high probability that something exists and actually believe that it exists, yet this is far short of knowing it exists. One cannot know something that does not exist. Yet, one can be aware of a high probability that a circumstance exists, and even believe that it exists, despite the fact it does not exist.

The knowledge instruction at issue in the instant case was based on Model Penal Code § 2.02(7) which states:

> *Requirement of Knowledge Satisfied by Knowledge of High Probability.* When knowledge of the exist-

[4] This definition comports with the definition of knowledge contained in Model Penal Code § 2.02(2)(b), which is discussed below.

> ence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probabilty of its existence, unless he actually believes that it does not exist.

Both the Government and Judge Hall contend that this is an accurate definition of knowledge. I disagree.

According to the Model Penal Code, a person generally "is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense." Model Penal Code § 2.02(1). Comment 9 to section 2.02(7) makes it clear that section 2.02(7) is only to be used to fulfill the "knowingly" requirement when willful ignorance is an issue. Comment 9 states:

> Subsection (7) deals with the situation that British commentators have denominated "willful blindness" or "connivance," the case of the actor who is aware of the probable existence of a material fact but does not determine whether it exists or does not exist.

Model Penal Code § 2.02(2)(b) further demonstrates that section 2.02(7) is not a "comprehensive definition" of knowledge, as Judge Hall contends it is. *See* Judge Hall's opinion at 619. Section 2.02(2) is entitled "Kinds of Culpability Defined." Each crime described in the Model Penal Code requires a specific kind of culpability. Section 2.02(2)(b) defines the culpable state of "knowingly" and includes the definition for knowledge of a circumstance. It provides in relevant part:

A person acts knowingly with respect to a material element of an offense when:

> (i) if the element involves the nature of his conduct or the *attendant circumstances,* he is *aware* that his

> conduct is of that nature or that such circumstances exist. . . .

Model Penal Code § 2.02(2)(b) (emphasis added). If section 2.02(7) were a comprehensive definition of knowledge, as Judge Hall maintains it is, there would be no need for section 2.02(2)(b) which is, in fact, the Model Penal Code's general definition of knowledge.

I am convinced that Model Penal Code § 2.02(7) is relevant only when there is evidence of willful blindness. In *United States v. Jewell,* 532 F.2d 697 (9th Cir.) (en banc), *cert. denied,* 426 U.S. 951, 96 S.Ct. 3173, 49 L.Ed.2d 1188 (1976), this court considered a case in which the defendant purposely avoided learning whether there was marijuana in the car he was driving from Tijuana, Mexico, to California. In finding that the defendant "knew" of the marijuana, this court recognized that " 'knowingly' includes a mental state in which the defendant is aware that the fact in question is highly probable *but consciously avoids enlightenment. . . .*" *Id.* at 704 (emphasis added). If, as Judge Hall and the Government contend, an awareness that a fact is highly probable constitutes knowledge, then the italicized part of the quoted sentence would be superfluous.

The *Jewell* court went out of its way to make it clear that an awareness of a high probability that a circumstance exists is sufficient to fulfull a requirement of knowledge only when the defendant consciously chooses to avoid obtaining positive knowledge. "It is worth emphasizing," we stated, "that the required state of mind differs from positive knowledge *only so far as necessary to encompass a calculated effort to avoid the sanctions of the statute while violating its substance.*" *Id.* (emphasis added) (footnote omitted). Thus, the *Jewell* court concluded that deliberate ignorance was sufficient to fulfill the knowledge

requirement not because deliberate ignorance is the equivalent of knowledge, but because deliberate ignorance is just as culpable as knowledge. *Id.* at 700.

I can find no decisions by this court or by the Supreme Court that employ section 2.02(7) as a general definition of knowledge. Both the Government and Judge Hall rely on a footnote in *Leary v. United States,* 395 U.S. 6, 46 n. 93, 89 S.Ct. 1532, 1553 n. 93, 23 L.Ed.2d 57 (1969), for the proposition that section 2.02(7) is a general definition of knowledge. Their reliance on *Leary* is misplaced. The *Leary* Court did not purport to adopt section 2.02(7) as a general definition of knowledge. Examination of the footnote reveals that the Court adopted section 2.02(7) only for the purposes of 21 U.S.C. § 176a. The entire footnote states:

> Nothing in the legislative history of § 176a is of aid in determining the intended scope of the word "knowing," as it is used in *that section.* In making *that determination,* we have employed as a general guide the definition of "knowledge" which appears in the Proposed Official Draft of the Model Penal Code, at 27 (1962). The Code provides:
>
> > "When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist."

Leary, 395 U.S. at 46 n. 93, 89 S.Ct. at 1553 n. 93 (emphasis added).

Leary differs in several important ways from the instant case. In *Leary,* the defendant was convicted of smuggling marijuana into the United States in violation of 21 U.S.C. § 176a. Drug smuggling is the classic case in which deliberate ignorance is a concern. *See Jewell,* 532 F.2d at 703

(noting the large number of drug smuggling cases involving conscious avoidance). There is no reason to believe that people who reveal wiretaps or wiretap applications often consciously avoid knowledge of the wiretaps or wiretap applications. Certainly, there is no evidence that Judge Aguilar tried to avoid learning about the wiretaps here.

Turner v. United States, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970), reinforces the conclusion that section 2.02(7) applies only to cases in which deliberate ignorance is a concern. In *Turner,* the statute at issue, 21 U.S.C. § 174, was virtually identical to the statute at issue in *Leary,* 21 U.S.C. § 176a. Section 176a was concerned with marijuana smuggling, and section 174 was concerned with narcotics smuggling. The Court concluded, " 'Common sense' (*Leary v. United States, supra,* 395 U.S. at 46, 89 S.Ct. at 1553) tells us that those who traffic in heroin will inevitably become aware that the product they deal in is smuggled, unless they practice a studied ignorance to which they are not entitled." *Id.* 396 U.S. at 417, 90 S.Ct. at 653 (citation in original) (footnote omitted).

With respect to the statutes involved in both *Turner* and *Leary,* there was an obvious congressional intent for juries to infer knowledge. Both section 176a[5] and section 174[6] explicitly permitted juries to infer or presume knowledge. Nothing on the face of section 2232(c) indicates a congressional intent to allow juries to infer or presume knowledge.

[5] Section 176a provided in part:

> Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

21 U.S.C. § 176a.

[6] Section 174 provided in part:

> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

21 U.S.C. § 174.

Moreover, contrary to the Government's contentions, the legislative history of section 2232(c) does not indicate a congressional intent to adopt Model Penal Code § 2.02(7) as a general definition of knowledge. On June 19, 1986, the House Judiciary Committee reported the House bill as H.R. 4952. The report accompanying that bill included a footnote concerning the knowledge requirement for conviction of disclosing a wiretap. *See* H.R.Rep. No. 647, 99th Cong., 2d Sess. 60, n. 91 (1986). The footnote simply refers to H.R.Rep. No. 1396, 96th Cong., 2d Sess. 32-36 (1980), which accompanied the Criminal Code Revision Act of 1980. The Senate Judiciary Committee issued a report to accompany its own bill, S. 2575. This Senate Report explains that to convict under section 2232(c), "[i]t is required that the defendant have knowledge that the Federal law enforcement or investigative officer has been authorized or has applied for an interception order." S.Rep. No. 541, 99th Cong., 2d Sess. 34 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3588. The report makes no attempt to define knowledge, and the footnote present in the House Report is not contained in the Senate Report. The House eventually substituted the Senate bill for its own, and Congress enacted the Senate bill into law. Therefore, any definitions of knowledge contained in the House Report would be of dubious value in determining Congress's intended definition of knowledge.

Even if we were to accept the footnoted reference to H.R.Rep. No. 647 as evidence of congressional intent, it is clear from the report that Congress did not intend to adopt Model Penal Code § 2.02(7) as a general definition of knowledge. The footnote cites pages 32-36 of H.R.Rep. No. 1396. On page 33, the report defines a knowing state of mind as "an awareness of or a firm belief in the existence of the circumstance."

The only reference in H.R.Rep. No. 1396 to section 2.02(7) is in the discussion of willful blindness. The Report states:

> The Model Penal Code language [in Section 2.02(7)], in the words of its drafters, "deals with the situation British commentators have denominated 'wilful blindness' or 'connivance,' the case of the actor who is aware of the probable existence of a material fact but does not satisfy himself that it does not in fact exist." Model Penal Code section 2.02, Comment at 129-30 (Tent. Draft No. 4, 1955). The Committee intends to incorporate this Model Penal Code concept as that concept has been explained in such Federal cases as *United States v. Jewell,* 532 F.2d 697 (9th Cir.), *cert. denied,* 426 U.S. 951, 96 S.Ct. 3173, 49 L.Ed.2d 1188 (1976); and *United States v. Jacobs,* 475 F.2d 270 (2d Cir.), *cert. denied, sub nom. Thaler v. United States,* 414 U.S. 821, 94 S.Ct. 131, 38 L.Ed.2d 53 (1973).

Id. at 35-36. Both *Jewell* and *Jacobs* discuss the language of section 2.02(7) in the context of willful blindness. *See Jewell,* 532 F.2d at 700-01; *Jacobs,* 475 F.2d at 287-88.

The Government's reliance on *United States v. Yermian,* 708 F.2d 365 (9th Cir. 1983), *rev'd on other grounds,* 468 U.S. 63, 104 S.Ct. 2936, 82 L.Ed.2d 53 (1984), is also misplaced. In *Yermian,* the defendant was convicted of making a false statement in a matter within

the jurisdiction of a federal agency, in violation of 18 U.S.C. § 1001 (1976). *Id.* at 365-66. The issue in *Yermian* was whether an objective *mens rea* was sufficient for conviction. The court was not concerned with setting forth a general definition of knowledge. The district court instructed the jury that it could convict the defendant if it found "that the defendant knew *or should have known* that the information was to be submitted to the government." *Id.* at 371 (emphasis in original). In *Yermian,* we were concerned that the "should have known" language imposed an objective standard, and we concluded that a subjective state of mind was necessary. *See id.* at 372.

The instruction in the case at bar differs significantly from the instruction in *Yermian.* Here, we are not concerned that the instruction imposed an objective standard; we are concerned that it imposed the *wrong* subjective standard. An awareness of a high probability that a circumstance exists is no doubt a subjective state of mind. Nevertheless, it is a subjective state of mind that differs substantially from the subjective state of mind that is knowledge.

The Due Process Clause places the burden on the Government to prove knowledge beyond a reasonable doubt. *See In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970). The instruction relieved the Government of this burden of proof by requiring the jury to infer knowledge from the defendant's awareness of a high probability that a circumstance existed. The instruction was therefore improper.

The instruction's balancing clause, which states, "unless you find from the evidence that the defendant actually believed that the circumstance did not exist," does not remedy the flawed instruction. This clause merely made the conclusive inference rebuttable. The burden of rebuttal was placed on the defendant. Under *Sandstrom v.*

Montana, 442 U.S. 510, 521, 99 S.Ct. 2450, 2458, 61 L.Ed.2d 39 (1979), this burden shifting is constitutional error. *See United States v. Hogg*, 670 F.2d 1358, 1363-64 (4th Cir.1982) (instructing jury to infer knowledge from deliberate avoidance unless defendant believed circumstance did not exist was constitutional error). The instruction allowed the jury to convict Judge Aguilar even if he was uncertain about whether there was a wiretap application or authorization. *See United States v. North*, 910 F.2d 843, 886 (D.C.Cir.) (requirement that defendant prove he lacked a belief reverses the burden of proof; knowledge does not mean lack of knowledge), *superseded on other grounds*, 920 F.2d 940 (1990), *cert. denied*, ____ U.S. ____, 111 S.Ct. 2235, 114 L.Ed.2d 477 (1991).

D. *Harmless Error*

The erroneous knowledge instruction could not be harmless beyond a resonable doubt. First, Judge Peckham indicated only that Chapman's name had come up in connection with an application. He did not indicate that Chapman's phone was to be tapped or that Chapman was to be a person whose calls would be intercepted. In providing the information required in an application for a wiretap under 18 U.S.C. § 2518(1) (1988), many persons' names "could come up" in explaining the nature of the investigation without those persons being designated as proposed interceptees. Thus, a question of fact exists as to whether Judge Aguilar "knew" from Judge Peckham's statements that Chapman's calls would be intercepted. This is particularly a fact to be resolved when it is recalled that Judge Peckham was simply trying to advise Judge Aguilar that it might be unwise for him to be seen associating with Chapman, and not to relate to him whose messages were to be intercepted by the wiretap.

Secondly, it is important to note that there has been a subtle shift in the Government's position on what it contends Judge Aguilar had to know. The Government contends it is enough to establish that Judge Aguilar knew there was once an application for a wiretap, in which Chapman's name came up, and that "putting two-and-two together" he then knew eight months thereafter that there was a wiretap that could intercept Chapman's messages. Even if we accept this proposition, there is a serious factual question as to what Judge Aguilar could have known and what he merely suspected.

If Judge Aguilar had been completely and fully informed of the application about which Judge Peckham spoke, he would have known that there was an application to tap Tham's telephone and that Chapman's messages were designated to be intercepted. Further, he would have known that the authorization was granted on April 20, 1987, and terminated on May 20, 1987. In order for Judge Aguilar to have known that Chapman's messages could be intercepted on February 6, 1988, over eight months after the authorization terminated, he would have had to have known that a new application had been made, with all of the detailed specific requirements of 18 U.S.C. § 2518(1) having been fulfilled and the authorization having been granted by the court. Even an extension of a prior authorization requires a new application complying with section 2518(1). Furthermore, the Tham application mentioned by Judge Peckham was based on a national labor racketeering investigation, an investigation entirely different from the investigation resulting in the later wiretaps. It is very difficult to see how Judge Aguilar possibly could have "known" of these wiretaps as opposed to having had a mere suspicion, based on the then-current surveillance of Chapman and himself. Even if this were

the knowledge required, there was a serious question of fact that the jury was required to resolve under the erroneous instruction. It could not have been harmless error.

The Government argues, and Judge Hall agrees, that any error in the knowledge instruction is harmless beyond a reasonable doubt because Judge Aguilar stated in a taped conversation three nonths after the time of the alleged offense that he "knew" they were wiretapping Chapman. *See* Judge Hall's opinion at 620. We are all familiar with the colloquial expression that we "know" something when we only expect it to be true: "I know it will rain," "I know someone will be elected," "I know the road will be clear." The jury had to evaluate more than this expression; it had to consider what Judge Aguilar actually could have known. He knew that Judge Peckham had stated that Chapman's name had come up in connection with a wiretap application eight months before, and he knew that there was a person, who he believed to be an FBI agent, that appeared to be conducting a surveillance of Chapman. These facts most certainly present a jury question of whether on February 6, 1988 Judge Aguilar really "knew" Chapman's communications were being tapped. The instruction requiring that the jury find only a high probability that he knew as opposed to requiring actual awareness of the fact, would play a crucial part in guiding the jury's determination of the knowledge element of the crime. It could not be harmless beyond a reasonable doubt.

Furthermore, the recent decision of the Supreme Court in *Sullivan v. Louisiana*, ____ U.S. ____, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), indicates that an erroneous instruction on an essential element of the crime can never be harmless because it deprives a defendant of his Sixth Amendment right to have the jury determine that issue of fact. The *Sullivan* Court held that an erroneous instruction defining reasonable doubt cannot be harmless

because the defendant has a Sixth Amendment right to have the jury determine his guilt. *Id.* at ____, 113 S.Ct. at 2081-83. It does not fulfill Sixth Amendment requirements to have judges hypothesize that a guilty verdict would have been rendered no matter how overwhelming the evidence of guilt might be. *Id.* at 2081-83.

Justice Scalia's opinion in *Sullivan* states:

> Harmless-error review looks, we have said, to the basis on which "the jury *actually rested* its verdict." *Yates v. Evatt*, 500 U.S. ____, ____, 111 S.Ct. 1884, 1893, 114 L.Ed.2d 432 (1991) (emphasis added). The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the quilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

Id.

This principle is equally applicable to a finding of an essential element of a crime—in this case, knowledge. In order to render a verdict of guilty, a jury must find all of the essential elements of the crime, under proper instruction. "[A] jury's verdict [of guilty] cannot stand if the instructions provided the jury do not require it to find *each element of* the crime under a proper standard of proof." *Cabana v. Bullock*, 474 U.S. 376, 384, 106 S.Ct. 689, 696, 88 L.Ed.2d 704 (1986) (emphasis added) (citing *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)). Here, the jury did not make a finding of knowledge under a proper instruction. For appellate court judges to make this finding, by concluding what the jury *would have found* under a proper instruction, violates the defendant's

Sixth Amendment right to have a jury actually make that finding. It is a structural error of constitutional dimension—the judges, instead of the jury, are making the finding essential to the verdict. *See Sullivan,* ____ U.S. at _____, 113 S.Ct. at 2082-83.

Justice Scalia vividly makes this point in his earlier concurring opinion in *Carella v. California,* 491 U.S. 263, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989).

> The constitutional right to a jury trial embodies "a profound judgment about the way in which law should be enforced and justice administered." It is a structural guarantee that "reflect[s] a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." A defendant may assuredly insist upon observance of this guarantee even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt. That is why the Court has found it constitutionally impermissible for a judge to direct a verdict for the State.
>
> . . . .
>
> In other words, "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials."
>
> . . . And the problem would not be cured by an appellate court's determination that the record evidence *unmistakably* established guilt, for that would represent a finding of fact by judges, not by a jury. As with a directed verdict, "the error in such a case is that the wrong entity judged the defendant guilt."

Id. at 268-69, 109 S.Ct. at 2422 (internal citations omitted).

I shall summarize my position:

Judge Aguilar was charged with having knowledge of an *application* to intercept wire communications and attempting to impede *such* communications. It is not a violation of section 2232(c) to have knowledge of one application but seek to impede the communications sought to be intercepted by another application.

It is clear that Judge Aguilar could not have impeded any interception of communications sought by the application resulting in the April 20, 1987 authorization. The life of that application had long since ended. Judge Hall and Judge O'Scannlain have adopted the Government's position and focused on Judge Aguilar's knowledge of a new wiretap on Chapman's telephone in effect on February 6, 1988. They conclude that by putting two and two together (the knowledge of the earlier application to tap Tham's telephone and the FBI surveillance on the street) that Judge Aguilar "knew" Chapman's telephone was being tapped. *See* Judge Hall's opinion at 617. Thus, they conclude that this "puttting two and two together" is equivalent to actual knowledge and, even more importantly, that this was the only decision the jurors could have reached, even if they were properly instructed on the issue.

Following the logic of that approach, it would have to be proved beyond a reasonable doubt that Judge Aguilar knew that a new and different application had been made to tap Chapman's telephone and that Judge Aguilar sought to impede the interception of communications sought in that application. The earlier application was to tap Tham's telephone in an entirely different investigation. It is very difficult for me to see how a jury, even under a proper instruction, could have found that Judge Aguilar "knew" of some new application that authorized the tapping of Chapman's telephone in February of 1988. No

doubt he suspected it was true. I can see how a jury under a "high probability" instruction could have determined that Judge Aguilar's strong suspicions constituted enough proof that the requisite knowledge existed. However, there was, at the very least, a serious factual question concerning his knowledge that had to be determined under a correct instruction on the law. The instructional error could not be harmless beyond a reasonable doubt.

III. *OBSTRUCTION OF JUSTICE CHARGE*

A. *Summary of Reasons for Reversal*

There are also two reasons for reversing the obstruction of justice charge. The first is that 18 U.S.C. § 1503, under which Judge Aguilar was charged, does not apply to the facts of this case. The second is that even if section 1503 did apply to the facts of this case, the erroneous knowledge instruction, previously discussed in Section II. C., would require reversal. Knowledge of certain facts are essential elements of the crime, and the erroneous knowledge instruction seriously misinformed the jury about determining these elements of the crime.

B. *The Statute Does Not Apply*

The conviction on this charge requires reversal because the interpretation of section 1503 cannot be stretched to reach the facts of this case. The facts are that Judge Aguilar, as a target of the investigation, gave misinformation to the FBI, minimizing his involvement with Chapman and attorney Solomon. At most, this is a false statement to the FBI that interferes with its investigation. This type of offense would have to be proved under 18 U.S.C. § 1001 (1988), which concerns false statements to federal agencies. Judge Aguilar was not charged with a violation

of section 1001. Furthermore, even under a section 1001 charge, the statute does not apply to certain situations where a truthful response would have incriminated the declarant. This is known as the "exculpatory no" doctrine. We explained the application of section 1001 and the "exculpatory no" doctrine in *United States v. Equihua-Juarez,* 851 F.2d 1222, 1224 (9th Cir. 1988).

In the case before us, Judge Aguilar is charged with obstructing justice under section 1503. This requires the obstruction of a judicial proceeding, not simply an FBI investigation. The judicial proceeding he is charged with obstructing is a grand jury investigation of a conspiracy involving himself and others. Judge Aguilar did not coerce, intimidate, or attempt to persuade the FBI agents to testify falsely before the grand jury. He simply misinformed the FBI about the extent of his contacts with Chapman and Solomon. This is not admirable, but it does not constitute the crime of obstructing justice under section 1503.

As I state in the next section, there is a serious question as to whether Judge Aguilar had the requisite knowledge that a grand jury was investigating this matter and that these FBI agents were expected to be witnesses. Even assuming he had the requisite knowledge, he did not violate this statute simply by misinforming the FBI of his contacts with Chapman and Solomon. To construe the statute as the Government has in this case would mean that anyone who makes a false statement to any person who is expected to be a witness before a grand jury or any other judicial proceeding about a subject under investigation could be guilty of the crime of obstructing justice. Other statutory sections safeguard against misinformation to a grand jury. False testimony before a grand jury is punishable as perjury. Causing a witness knowingly to testify

falsely is suborning perjury. This obstruction of justice statute was simply not intended to extend to the facts of this case. I know of no other reported case where such a charge has been held to be proper, and none has been cited by the Government.[7]

Judge Aguilar was convicted of Count Eight, which stated:

> 1. At all times relevant to this count of the indictment, defendant AGUILAR was aware that a federal grand jury in the Northern District of California was investigating possible violations of federal criminal law by ROBERT P. AGUILAR, Abe Chapman, Michael Rudy Tham, and others.
>
> 2. On or about June 22, 1988, defendant ROBERT P. AGUILAR, while a United States District Judge, did corruptly endeavor to influence, obstruct, and impede the aforementioned grand jury investigation, and thus the due administration of justice in the Northern District of California, by mak-

[7] The Tenth Circuit was recently faced with a case in which a defendant had been charged with violating 18 U.S.C. § 1001 and § 1503 for making false statements to FBI agents who were investigating on behalf of a sitting grand jury. The district court had dismissed the obstruction of justice charge for failure to adequately state a crime under 18 U.S.C. § 1503. *United States v. Wood,* 958 F.2d 963, 964-65 (10th Cir.), *amended on other grounds,* 1992 WL 58305 (March 19, 1992).

The specific issue of whether this was a proper charge under section 1503 was not raised in the appeal. The court expressed no opinion on whether the conduct charged was proscribed by section 1503. However, the court expressed some skepticism that it was, noting that obstruction of justice could be committed in a variety of ways but that "we have not found one reported case where a person was charged with, much less convicted of, obstructing justice based on unsworn false statements to FBI agents investigating on behalf of a grand jury." *Id.* at 974-75 and n. 19.

> ing false and misleading statements to Special Agents of the Federal Bureau of Investigation concerning defendant AGUILAR's assistance to Michael Rudy Tham and concerning defendant AGUILAR's knowledge and disclosure of information concerning court-ordered electronic surveillance of Abe Chapman.
>
> In violation of Title 18, United States Code, Section 1503.

A brief history of section 1503 is enlightening as to Congress's intended application of the statute. Briefly stated, section 1503, as it was originally enacted in 1948, specifically proscribed certain conduct seeking to influence witnesses in judicial proceedings. The title of the section, as well as the body, indicated that the statute was intended to cover judicial officers, jurors, and witnesses. The full text of the statute is set forth in the margin.[8] In 1982, Congress

[8] § 1503. **INFLUENCING OR INJURING OFFICER, JUROR** OR WITNESS GENERALLY

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

62 Stat. 769 (1948).

enacted the Victim and Witness Protection Act, 96 Stat. 1248 (1982). This new statute removed all references to witnesses in section 1503 and enacted a new section, section 1512, addressed specifically to the influencing of witnesses, victims, and informants. The Second Circuit in *United States v. Hernandez,* 730 F.2d 895, 899 (2d Cir. 1984), stated in its conclusion that section 1512 replaced that part of section 1503 that pertained to witnesses. The *Hernandez* case involved a threat to kill a witness, and the court held that the charge could not be sustained under section 1503. *Id.*

Our court faced a charge of witness tampering under somewhat difference circumstances in *United States v. Lester,* 749 F.2d 1288 (9th Cir. 1984). The facts in the *Lester* case involved the hiding and bribing of a witness in order to prevent him from testifying in a criminal trial. We disagreed with the broad statement of the Second Circuit in the *Hernandez* case that "congress affirmatively intended to remove witnesses entirely from the scope of § 1503." *Id.* at 1295. We distinguished *Hernandez,* noting that it dealt with intimidation and harassment of a witness, whereas *Lester* involved non-coercive witness tampering. We observed that section 1512 did not encompass such non-coercive conduct and, thus, concluded that this conduct still remained punishable under the omnibus clause of section 1503. *Id.* at 1295-96.

In 1986, the Second Circuit dispelled any doubts about what was meant by the *Hernandez* opinion, stating that section 1512 was intended to completely supplant the portion of section 1503 that dealt with witnesses. *United States v. Jackson,* 805 F.2d 457, 461 (2d Cir. 1986), *cert. denied,* 480 U.S. 922, 107 S.Ct. 1384, 94 L.Ed.2d 698 (1987). This presented a clear conflict with our *Lester* case.

In 1988, Congress obviated this conflict between the Ninth and Second Circuits by amending section 1512 to

cover specifically non-coercive witness tampering. This eliminated the problem that we discussed in *Lester.*[9] Section 1512, as it read at the time of our decision in *Lester,* was limited to witness tampering by a person who accomplished it or attempted to accomplish it through intimidation, physical force, threats or misleading conduct. This left non-coercive witness tampering untouched unless it could be classified as "misleading conduct." The 1988 amendment to section 1512 inserted the phrase "or corruptly persuades" within the proscribed conduct, thus providing for non-coercive witness tampering. The pertinent part of section 1512 as amended is as follows:

> (b) Whoever knowingly uses intimidation or physical force, threatens, *or corruptly persuades* another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—
>
> (1) influence, delay, or prevent the testimony of any person in an official proceeding;
>
> . . . .
>
> shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

This amendment was adopted November 18, 1988, approximately five months after the conduct forming the basis for the charge against Judge Aguilar occurred. Thus, in our circuit, under the authority of the *Lester* opinion, non-coercive witness tampering was still covered under the omnibus clause of section 1503.

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[9] The Second Circuit in *United States v. Masterpol,* 940 F.2d 760, 763 (2d Cir. 1991), observed that the 1988 amendments "diminished significantly" the force of the *Lester* precedent. Perhaps, more fundamentally, it could be stated that the problem we saw in *Lester* was alleviated by Congress.

The importance of the legislative history to this case is that in removing the conflict between the Ninth Circuit and the Second Circuit, Congress indicated what type of non-coercive conduct was meant to be proscribed with regard to witnesses. It is conduct that "*corruptly persuades . . . or attempts to do so*" in order to influence or prevent the testimony of any person in an official proceeding.

Section 1503 currently provides:

> **§ 1503. Influencing or injuring officer or juror generally**
>
> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, *or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice,* shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1503 (emphasis added.) The italicized part of this statute is often referred to as the "omnibus clause," and it is the part of the statute that Judge Aguilar is alleged to have violated.

In order to sustain a conviction under that clause, it must be found that Judge Aguilar's actions "corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice." Congress's translation of this requirement as it pertains to witnesses, by its amendment to section 1512, indicates that the conduct must involve a defendant who "corruptly persuades . . . or attempts to [persuade]" a witness so as to influence his testimony.

If a person sought to influence the testimony of a witness by bribery or extortion, this would clearly fall within the normally accepted meaning of corrupt. Simply making a false statement to a witness is a far cry from any generally accepted meaning of "corrupt influence" or "corrupt persuasion." To place in contrast the type of conduct that would be corrupt influence, in my opinion, consider the following hypothetical fact situation: FBI agents go to a judge, state that they have done an investigation, and reveal certain facts that they intend to relate to a grand jury, which indicate that the judge had engaged in a conspiracy to influence another judge. If the defendant judge appeals to them not to so testify because it would harm his career, offers them a bribe not to testify, or threatens that he will see that they lose their jobs if they testify—that would amount to an attempt to corruptly influence the FBI agents to change their testimony.

Judge Aguilar did not try to tell the FBI agents how to testify, did not try to persuade them not to testify, and did not try to dissuade them from testifying as to what their investigation otherwise revealed. He simply did not tell them the straight story as to his contacts with Chapman and Solomon. This is very different from the other types of activities enumerated in section 1503.

There is a significant difference between making a false statement to a potential witness and trying to get a witness to change his or her testimony through threats, force, bribery, extortion or other means of corrupt persuasion. If "corruptly influence" is extended to mean "making false statements to a potential witness," we will have expanded the statute far beyond its reasonable construction. If for no other reason, the rule of lenity would preclude such a construction.

An additional reason why the evidence in this case is insufficient to sustain a conviction under section 1503 is the lack of proof that the FBI was acting on behalf of the grand jury. We have interpreted section 1503 as extending only to interference with a pending judicial proceeding. *United States v. Brown*, 688 F.2d 596, 598 (9th Cir. 1982). Interference with a government agency's investigation is insufficient. *Id.* There is no evidence that a grand jury had authorized or directed the FBI investigation; nor is there evidence that the FBI agents had been subpoenaed to testify. At most, the conduct alleged was interference with an FBI investigation, not a judicial proceeding. The mere fact that the FBI investigation could result in producing evidence that might be presented to a grand jury is insufficient to constitute a violation of section 1503. In *Brown*, we held that although warning the target of a search warrant did interfere with a policy investigation, it did not constitute interference with a grand jury proceeding even though evidence derived from the search might have been presented to a grand jury. *See id.*

C. *Erroneous Knowledge Instruction*

Even if section 1503 applied to false statements made to FBI agents, we would have to reverse because the knowledge instruction was erroneous. The violation of section

1503 requires that the defendant know of the pending judicial proceeding and that the FBI agents were expected to be called to testify. *See United States v. Washington Water Power Co.*, 793 F.2d 1079, 1084 (9th Cir. 19856). There is a serious question of fact, given the noncommittal responses of the FBI agents, as to whether Judge Aguilar knew a grand jury had been convened and, if so, what it was investigating. Furthermore, it was not at all clear that the agents were expected to be called to testify before a grand jury.

In Section II. C., I have discussed the serious error in the knowledge instruction given by the court. Under that instruction, the jury could have convicted Judge Aguilar even if he was not actually aware of the pertinent facts, provided the jury found that there was a "high probability" that he knew. In light of the conflicting evidence, this error could not have been harmless beyond a reasonable doubt. As previously noted, the Supreme Court's recent decision in *Sullivan* indicates that an erroneous instruction on an essential element of the crime can never be harmless. *See* ____ U.S. at ____-____ 113 S.Ct. at 2081-83.

IV. *CONCLUSION*

In conclusion, I would reverse on both counts on the ground of insuffiency of the evidence. The statutes that Judge Aguilar allegedly violated do not extend to the facts of this case. Even if this were not the case, I would reverse and remand for a new trial on the basis that the knowledge instruction was erroneous and prevented the jury from properly deliberating on essential elements of the crimes charged. In neither case can this serious error concerning essential elements of the crime be determined to be harmless beyond a reasonable doubt.

O'SCANNLAIN, Circuit Judge, concurring in part:

I would affirm Judge Aguilar's conviction for disclosure of a wiretap under 18 U.S.C. § 2232(c) but would reverse his conviction for obstruction of justice under 18 U.S.C. § 1503. Thus, I concur in the result reached by Judge Hall as to Count Six and in the result reached by Judge Hug as to Count Eight.

As to the appeal of the sentence, we reject the government's challenge to the district court's decision to depart downward from the Sentencing Guidelines. However, the court failed to follow the procedure set forth in *United States v. Lira-Barraza*, 941 F.2d 745 (9th Cir. 1991) (en banc). Consequently, we must vacate the sentence on Count Six and remand for resentencing.

I

I agree with Judge Hall that a rational trier of fact could find beyond a reasonable doubt that Judge Aguilar had knowledge of the wiretap application; there clearly was sufficient evidence in the record. Accordingly, I concur in part II.A of her opinion. I also agree that section 2232(c) does not violate the First Amendment as applied to Judge Aguilar. Accordingly, I concur in part II.B of her opinion. I cannot agree, however, with Judge Hall's analysis of the knowledge instruction in parts II.C and II.D of her opinion. I believe that the district court's knowledge instruction was erroneous for the reasons set forth by Judge Hug in section C of his opinion; nevertheless, I conclude that the error, fatal as to Count Eight, was harmless as to Count Six.

I believe that Judge Hug's analysis of the knowledge instruction is correct. Therefore, reversal on both counts is required unless the error was logically harmless beyond any reasonable doubt because the record compels a guilty

verdict. *United States v. Sanchez-Robles*, 927 F.2d 1070, 1075 (9th Cir. 1991); *see also United States v. Alvarado*, 838 F.2d 311, 317 (9th Cir.) ("Application of the harmless error doctrine is appropriate where the evidence of guilt is so overwhelming that a conviction is compelled."), *cert. deied*, 487 U.S. 1222, 108 S.Ct. 2880, 101 L.Ed.2d 915 and 488 U.S. 838, 109 S.Ct. 103, 102 L.Ed.2d 78 (1988). Applying any other standard of review to this erroneous instruction would allow for conviction without establishment of knowledge, an essential element of the offense, beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970) (due process requires that each element of an offense be proved beyond reasonable doubt). *But see United States v. Valle-Valdez*, 554 F.2d 911, 915-16 (9th Cir. 1977) (noting some confusion in the cases, but observing that errors in jury instructions are generally considered non-constitutional and therefore the standard from *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), need not apply).

A

After examination of the record, I conclude that the error was harmless beyond a reasonable doubt with respect to Count Six, the wiretap count. The evidence of Judge Aguilar's knowledge consisted of the following:

(1) Both Judge Peckham and Judge Aguilar testified that Judge Peckham had told Judge Aguilar that Chapman's name had come up "in connection with" a wiretap;
(2) Judge Aguilar saw an FBI agent photographing Chapman outside Aguilar's house;
(3) Steve Aguilar testified that Judge Aguilar told him that he had overheard at work that Chapman was being wiretapped.

(4) Three months after Judge Aguilar revealed the wiretap to Chapman, he repeatedly told Solomon in recorded conversations that he knew Chapman's phone was tapped.

The strongest evidence against Judge Aguilar is the transcript of his May 17 conversation with Solomon. Because it post-dates Judge Aguilar's alleged violation of section 2232(c) by more than three months, I am reluctant to assign "overwhelming" weight to this evidence. *See* Judge Hall's Opinion, at 622. Nonetheless, the combination of what Judge Peckham told Judge Aguilar and what Judge Aguilar told Steve Aguilar shows conclusively that Judge Aguilar was substantially certain that Chapman had been or was being tapped. It does not appear that Judge Aguilar received any additional information between the disclosure and his self-incrimiating statements. I therefore conclude that the erroneous instruction was harmless beyond a reasonable doubt with regard to Count Six.

B

On the other hand, I cannot conclude that the error was harmless beyond a reasonable doubt as to Count Eight, the obstruction of justice count. The obstruction count requires a showing that the defendant knew: (1) that a grand jury was meeting, and (2) that the person tampered with was expected to be called as a witness before the grand jury. *United States v. Washington Water Power Co.*, 793 F.2d 1079, 1084 (9th Cir. 1986). There appears to be no room to doubt that Judge Aguilar knew a grand jury was meeting. Solomon told Judge Aguilar, in a recorded conversation on May 26, 1988, one month before the alleged violation, that the FBI had told him a grand jury was in session. Judge Aguilar indicated his understanding of this information by observing, later in the same conversation, "if they subpoena me I may have a problem."

However, the evidence is considerably thinner that Judge Aguilar knew that the FBI agents to whom he lied were expected to be witnesses before the grand jury. There is no direct evidence at all. Nor do Judge Aguilar's prevarications support an unequivocal inference of knowledge. It is equally plausible that he hoped his lies would dissuade the government from seeking an indictment against him.

Certainly, as the government points out, the jury could infer that Judge Aguilar, an experienced federal judge, deduced that the investigating FBI agents were likely to be witnesses before the grand jury. The availability of this inference, however, points up the danger of the "high probability" jury instruction. The jury could have concluded that Judge Aguilar did not know the agents were likely witnesses, but should have. In the absence of an instruction precluding conviction for negligence, I cannot be confident the jury did not convict for negligence.

Jury instructions are not to be examined in isolation. *Maddox v. City of Los Angeles,* 792 F.2d 1408, 1412 (9th Cir. 1986). The erroneous knowledge instruction could theoretically have been cured by the trial judge's instruction on intent to "impede, interfere with or obstruct the functioning of that grand jury." In my view, however, the intent instruction does not ameliorate the flaw in the knowledge instruction. The jurors may have concluded that Judge Aguilar intended to "obstruct the functioning of the grand jury" by inducing the government not to seek an indictment against him. Yet the government does not argue, and I do not believe, that such a showing is sufficient to violate section 1503. I therefore conclude that the erroneous knowledge instruction requires reversal of the conviction on Count Eight.

II

In imposing sentence, the district court assigned Judge Aguilar an offense level of 16,[1] which carries a sentence of twenty-one to twenty-seven months and a fine of $5,000 to $50,000 for persons in criminal history category I. The court then departed downward and assigned Judge Aguilar an offense level of 10 and sentenced him to two six month terms of imprisonment, to be served concurrently, and fined him $1000 on each count. The government appeals the district court's downward departure from the Sentencing Guidelines.

Under 18 U.S.C. § 3553(b), the district court must sentence a defendant within the applicable Guidelines range unless "the court finds there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Here, the court offered the following reasons for its departure:

> I do think Judge Aguilar now commences a long course of adversarial proceedings, . . . beginning with the Ninth Circuit Judicial Council, with the state and local bar associations, with the House of Representatives, with the United States Senate. Those proceedings will be long, humiliating, and burdensome and may even bring into a play a number of events that are not part of the convictions for which he

[1] The district court increased the offense level for Count Six from 12 to 14 for abuse of public trust under U.S.S.G. § 3B1.3. Judge Aguilar was convicted of multiple counts. Therefore, in calculating the combined offense level under U.S.S.G. § 3D1.4, the district court added two levels, resulting in a combined offense level of 16. Because we vacate one count of conviction, § 3D1.4 no longer applies. The maximum offense level applicable is 14, rather than 16.

> stands convicted before the court at this time. I think that burden is a major and substantial punishment that warrants some degree of departure downward.

The district court emphasized that its willingness to depart was limited only to those features that it believed "are so different and unique with this defendant, . . . and are so extensive and will be so enduring that it would be the sort of ground upon which a sentencing commission would favor a court sitting here today using it as a basis for departure."

Our review of the departure imposed by the district court involves three steps. *United States v. Lira-Barraza*, 941 F.2d 745, 746-47 (9th Cir. 1991) (en banc). First, we must determine whether the district court had the legal authority to depart from the Sentencing Guidelines. *Id.* at 746. Second, we review for clear error factual findings supporting the existence of the identified circumstance. *Id.* at 746-47. Third, we must determine whether a six level departure downward was unreasonable. *Id.* at 747. Here, because the district court's statement did not include "a reasoned explanation of the extent of the departure founded on the structure, standards and policies of the Act and Guidelines," *id.*, the district court failed to comply with the underlying requirements of the third step of *Lira-Barraza* and we must remand.

On remand, the district court may again choose to depart downward based on the additional punishment awaiting Judge Aguilar. The government vigorously contends that the district court does not have the legal authority to do so. We therefore believe that some comment on the appropriateness of departure is warranted.

The district court may depart if it identifies a mitigating circumstance of a kind or to a degree the Commission did not adequately take into account when formulating the Guidelines. *Id.* at 746. Even if the circumstance is one not adequately considered, the court cannot depart if the cir-

cumstance is inconsistent "with the sentencing factors prescribed by Congress in 18 U.S.C. § 3553(a), [and] with the Guidelines. . . ." *Id.*

The mitigating circumstance upon which the district court based its downward departure was the additional punishment it anticipated Judge Aguilar would suffer during the course of potential disbarment and impeachment hearings. The government argues that the Guidelines account for that circumstance in sections 3B1.3 and 3E1.1, which respectively establish an upward adjustment if the defendant had abused a position of trust and a downward adjustment if the defendant accepts responsibility for his actions by resigning his office. *See* U.S.S.G. §§ 3B1.3, 3E1.1 and comment. (n.1(f)). The court's ruling, however, was not based solely on the likelihood of impeachment, but on the likelihood that Judge Aguilar will suffer additional punishment throughout the course of several disciplinary hearings. The provisions cited by the government cannot be said to account for this circumstance.

Nor was the departure "inconsistent with the Guidelines' policy that disparity in sentencing should never be occasioned by socioeconomic factors." The district court did not rely on socioeconomic status to support its departure. Rather, the district court relied upon a determination that Judge Aguilar, because he is a federal judge, would be subject to punishment in addition to the court-imposed sentence. Judge Aguilar's job accounts for this extra punishment; the departure was not based on his level of wealth, privilege, or "status in society."[2] *Cf. United States*

[2] Although Judge Aguilar's job may constitute one component of his socioeconomic status, *see Lopez*, 938 F.2d at 1297, unlike Judge Hall, we are not convinced that one *component* of his socioeconomic status, his job, defines his socioeconomic status. *See* Judge Hall's Opinion, at 624.

We note in passing that, although the Guidelines specifically state that "socioeconomic status" is not a relevant factor in sentence determination, U.S.S.G. § 5H1.10, this court has recently suggested that consideration of socioeconomic "factors" may not always be precluded. *United States v. Valdez-Gonzalez*, 957 F.2d 643, 649 n. 3 (9th Cir. 1992).

v. Lopez, 938 F.2d 1293, 1297 (D.C.Cir. 1991). Additional punishment appears to be a valid mitigating factor. *Cf. United States v. Lara*, 905 F.2d 599, 601-03 (2d Cir. 1990) (departure upheld where defendant's vulnerability required prison officials to place him in solitary confinement, increasing the severity of his punishment).[3] Moreover, unlike Judge Hall, we do not consider each particular aspect of the additional punishment facing Judge Aguilar "abstractly and alone," *United States v. Cook*, 938 F.2d 149, 153 (9th Cir. 1991), but instead recognize the "unique combination of factors" that comprises the mitigating circumstance in this case. *Id.*

Judge Aguilar, if he is subjected to impeachment proceedings, will suffer additional punishment by the government, imposed in a public, quasi-judicial proceeding. If convicted upon impeachment, not only will he be removed

[3] The extra punishment identified by the district court can be distinguished from other collateral effects arising from conviction. For example, our court has held that the likelihood of deportation is not a valid basis for departure. *United States v. Alvarez-Cardenas*, 902 F.2d 734, 737 (9th Cir. 1990); *United States v. Ceja-Hernandez*, 895 F.2d 544 (9th Cir. 1990). These deportation cases, however, are distinguishable in two respects. First, despite its undeniable impact, deportation is not considered punitive. *See Galvan v. Press*, 347 U.S. 522, 531, 74 S.Ct. 737, 742, 98 L.Ed. 911 (1954). Second, *Alvarez-Cardenas* involved a drug conviction, and *Ceja-Hernandez* a conviction for illegal presence in the United States. Deportation as a consequence of the former is not rare, and as a consequence of the latter is the rule. We must therefore assume that the Sentencing Commission took the possibility of deportation into account when determining the appropriate offense level for these crimes. *See Ceja-Hernandez*, 895 F.2d at 545.

from his otherwise life-tenured position, he will be disqualified from holding any future government appointive position. *See United States v. Brown,* 381 U.S. 437, 448, 85 S.Ct. 1707, 1714, 14 L.Ed.2d 484 (1965) ("Disqualification from office may be punishment, as in cases of conviction upon impeachment.") (quoting *Cummings v. Missouri,* 71 U.S. (4 Wall) 277, 320, 18 L.Ed. 356 (1866)). If convicted upon impeachment, Judge Aguilar will also suffer full forfeiture of his pension rights, a loss of considerable economic significance.[4] Unlike most federal officers and employees, an Article III judge's pension does not vest until he attains at least age sixty-five and meets certain service requirements, typically fifteen years. *See* 28 U.S.C. § 371. In contrast, had he been an Article I judge such as a bankruptcy judge, or a magistrate judge, Judge Aguilar would have begun vesting upon completion of eight years of service and by now would be nearly fully vested in his right to receive the salary of the office for life beginning at age sixty-five. *See* 28 U.S.C. § 377. Therefore, unlike an Article I judge, or any other federal official or employee for that matter, an Article III judge who leaves office for any reason prior to the age of sixty-five forfeits all pension rights no matter how many years he may have served. From publicly available material, it appears that Judge Aguilar has served on the bench since 1980; should he leave office before April 15, 1996, the date of his sixty-fifth birthday, he will receive no retirement benefits whatsoever. This will be true whether he resigns voluntarily or suffers impeachment.

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[4] The right to receive, beginning at age sixty-five, the salary of the office (presently $133,600 per annum) for life, can be calculated from actuarial tables; the value of such annuity is likely to exceed $1.3 million dollars. *See* 28 U.S.C. § 371(a); *cf.* 5 U.S.C. § 8339.

Thus, the additional formal punishment to be imposed upon Judge Aguilar as a result of his conviction can be distinguished, both qualitatively and quantitatively, from the "substantial pain and humiliation" suffered by criminal defendants who are "well-known figures in the worlds of government and finance." For that reason we reject the suggestion that the additional punishment Judge Aguilar will suffer is not "atypical."[5] *See* U.S.S.G. Ch. 1, Pt. A4(b). While Judge Hall may be right that "well-known figures" of high social standing appear as criminal defendants all too frequently, the criminal conviction of an Article III judge is, thankfully, still a rare occurrence. Notwithstanding the recent impeachments of several federal judges,[6] Judge Aguilar is the first convicted federal judge to be sentenced under the Guidelines. As such, his case does not appear to fall within the heartland of cases for which the Guidelines were designed. Moreover, we reiterate that the additional punishment identified by the district court is not based upon Judge Aguilar's "personal financial hardship," "foreclosure of career opportunities,"

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[5] Similary, a forfeiture proceeding following a drug or racketeering conviction, or a civil damage award after a conviction for a white collar crime, simply is not "atypical." We cannot presume the Sentencing Commission did not anticipate these common collateral effects of conviction for such crimes when designing the Guidelines.

[6] *See Nixon v. United States,* 938 F.2d 239, 248, 250 (D.C.Cir. 1991) (Edwards, J., dissenting in part and concurring in judgment) (noting the recent impeachments of Harry E. Claiborne and Alcee Hastings, as well as Walter Nixon), *aff'd,* ____ U.S. ____, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993); *see also United States v. Claiborne,* 765 F.2d 784 (9th Cir. 1985), *cert. denied,* 475 U.S. 1120, 106 S.Ct. 1636, 90 L.Ed.2d 182 (1986); *United States v. Nixon,* 816 F.2d 1022 (5th Cir.), *reh'g denied,* 827 F.2d 1019 (5th Cir. 1987), *cert. denied,* 484 U.S. 1026, 108 S.Ct. 749, 98 L.Ed.2d 762 (1988); and *United States v. Collins,* 972 F.2d 1385 (5th Cir. 1992), *cert. denied,* ____ U.S. ____, 113 S.Ct. 1812, 123 L.Ed.2d 444 (1993).

or, especially, "loss of position." Judge Hall's Opinion, at 624-25. Thus, we are satisfied that Judge Bechtle had the legal authority to depart; the first element of *Lira-Barraza* was met.

Lira-Barraza also requires us to review for clear error the district court's factual findings supporting the existence of the identified circumstance. *Lira-Barraza,* 941 F.2d at 746-47. The government argues, in effect, that no factual findings were made as to the possibility that Judge Aguilar might avoid the humiliation of impeachment by resigning. The government's argument, as to step two, is well taken but may be ultimately moot. On remand, the district court should specifically consider whether other additional punishment, such as forfeiture of pension and disbarment, will result in the event of Judge Aguilar's potential resignation to avoid impeachment.

"The Guidelines are not a straightjacket for district judges. They do provide discretion to depart." *Cook,* 938 F.2d at 152. Congress has instructed sentencing courts "to provide just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A). In this case, Judge Hall would have us remand for the imposition of a more severe sentence even though we *reverse* one count of conviction. To do so without allowing the district court to consider in its discretion the additional formal punishment and the unusual financial ramifications that arise because of the appellant's job as an Article III judge would violate Congress's mandate to provide just punishment.

In sum, we agree that additional punishment is a permissible basis for downward departure. We remand, however, for the district court to follow the procedures established in *Lira-Barraza.* In particular, the court must consciously measure the extent of its departure against the sentencing structure established by the Act and the Guidelines. *Lira-Barraza,* 941 F.2d at 748.

III

In conclusion, I would affirm Judge Aguilar's conviction as to Count Six, reverse his conviction as to Count Eight, and remand for resentencing in accordance with the foregoing opinion.

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No. 94-270

In The

Supreme Court of the United States

October Term, 1994

THE UNITED STATES OF AMERICA,

Petitioner,

v.

ROBERT P. AGUILAR,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did false statements to FBI agents during an informal investigative interview unconnected with a grand jury constitute obstruction of justice within the meaning of the omnibus clause of 18 U.S.C. § 1503 prior to the enactment of the Criminal Law and Procedure Minor Substantive and Technical Amendments Act of 1987?

2. Does disclosure of the existence of a wiretap authorization that has expired constitute a violation of 18 U.S.C. § 2232(c)?

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THE UNITED STATES OF AMERICA,

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BRIEF IN OPPOSITION

Respondent Robert P. Aguilar respectfully requests that the Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit filed by the Solicitor General on behalf of the United States.

I. STATEMENT

On April 19, 1994, a unanimous eleven-member, *en banc* panel of the Ninth Circuit reversed the conviction of respondent Robert P. Aguilar, a judge of the United States District Court for the Northern District of California, for obstruction of justice in violation of 18 U.S.C. § 1503.

Nine of the eleven panel members also agreed to reverse Judge Aguilar's conviction for disclosure of a wiretap authorization in violation of 18 U.S.C. § 2232(c). In each instance, the Ninth Circuit ruled that the record did not establish a violation of the statute.

A. History of the Proceedings Below

Judge Aguilar originally was charged in an eight-count indictment along with Michael Rudy Tham ("Tham") and Abie Chapman ("Chapman") on June 13, 1989. The centerpiece of the charges against Judge Aguilar was that he violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), by allegedly obstructing the affairs of the U.S. District Court for the Northern District of California through a pattern of racketeering activity. The government charged Judge Aguilar, Tham and Chapman with one count of conspiracy to deprive the United States of its governmental rights and functions and to obstruct justice in connection with Tham's *habeas corpus* petition before the Honorable Stanley Weigel in violation of 18 U.S.C. § 371, and with one count of endeavoring to obstruct justice in violation of 18 U.S.C. § 1503. The government also charged Judge Aguilar alone with three additional violations of 18 U.S.C. § 1503; and two counts of unlawful disclosure of an application for a wiretap authorization in violation of 18 U.S.C. § 2232(c). *See* Pet. at 4a, 30a.

On March 19, 1990, a jury acquitted Judge Aguilar of one count of obstruction of justice, but was unable to reach a verdict on the remaining counts. The district court accordingly declared a mistrial and set a retrial for all

three defendants. Subsequently, the district court granted the unopposed motion of the government to dismiss with prejudice the RICO charge and one obstruction of justice count against Judge Aguilar and granted the unopposed motions of Tham and Chapman for severance. A second jury acquitted Judge Aguilar of all counts connected with the underlying conspiracy to influence Judge Weigel and one wiretap disclosure count, but convicted him of one count of endeavoring to obstruct justice in violation of 18 U.S.C. § 1503 and of unlawfully disclosing the existence of a wiretap application in violation of 18 U.S.C. § 2232(c). *Id.* at 4a-5a, 30a, 67a-68a; Tr. 1590-91.

A divided panel of the Ninth Circuit reversed the obstruction of justice conviction and affirmed the wiretap disclosure conviction. *Id.* at 29a-113a. A majority concluded that, as to both counts, the district court erroneously relieved the government of its burden to prove beyond a reasonable doubt the element of knowledge, essential to both counts of conviction, by requiring the government to establish only what Judge Aguilar "probably" knew. *Id.* at 77a-90a, 100a-101a, 102, 104a-105a. A different majority found that the erroneous jury instruction was harmless as to the wiretap disclosure conviction. *Id.* at 51a-52a, 103a-104a.

On rehearing *en banc*, the Ninth Circuit did not reach the knowledge issue. *Id.* at 25a. Instead, the court reversed both counts on the grounds that the conduct did not violate the statutes under which it was charged. *Id.* at 1a-28a. The eleven *en banc* panel members agreed unanimously that the government had not identified a violation of Section 1503. The court affirmed that there was "no evidence that a grand jury had authorized or directed

the FBI investigation, [or] . . . that the FBI agents had been subpoenaed to testify." *Id.* at 18a. Thus, "[t]he conduct alleged was interference with an FBI investigation, not a judicial proceeding." *Id.* The court unanimously held that "interference with an FBI investigation" by making false statements during an informal interview did not obstruct or impede a pending judicial proceeding in violation of Section 1503. *Id.* at 18a-24a.

The *en banc* court also held, over the dissent of only two of its members, that the alleged conduct failed to establish that Judge Aguilar had violated 18 U.S.C. § 2232(c). *Id.* at 8a-15a; 25a-28a. The court reasoned that "[t]he plain language of the statute makes it clear that the purpose of the statute is to prevent interference with a 'possible interception.' " *Id.* at 9a (quoting 18 U.S.C. § 2232(c)). Since the government charged Judge Aguilar with attempting to give notice of an authorization to intercept certain electronic communications that had expired more than eight months before the disclosure, *id.* at 5a-8a, the government failed to establish a violation of Section 2232(c). *Id.* at 15a.

B. Statement of the Facts

Throughout the lengthy appellate proceedings in this case, the government has consistently mischaracterized the trial record.[1] It has remained true to that practice in its

[1] *See, e.g.*, Reply/Response Brief for Defendant-Appellant, filed September 19, 1991, at 9-13; Defendant's Corrected Response to the Brief for the United States in Support of Partial Rehearing En Banc, filed July 7, 1993, at 1.

Petition. We address the government's specific misstatements below. Particularly offensive, however, is the government's continued emphasis on the charges of conspiracy and obstruction of which Judge Aguilar was acquitted, *see* Pet. at 4, 6-7, the more so because they are entirely irrelevant to the issues that the government has presented for review. The government's disingenuous presentation of disproved allegations as "facts" suggests that the only "special and important reason[]" for review on certiorari, S. Ct. R. 10.1, is the government's wish to be relieved from the unanimous findings of two successive juries.

1. Events Related to the Section 2232(c) Charge

This case arises out of a prolonged, extensive and ultimately fruitless FBI probe of possible labor racketeering activities by the late Abie Chapman, then an 83-year old alcoholic and distant relative of Judge Aguilar and Rudy Tham, a former union official. 4 Tr. 669; 7 Tr. 965, 982. On April 20, 1987, the FBI obtained an authorization signed by Judge Robert Peckham of the United States District Court for the Northern District of California for a 30-day wiretap on phones used by Tham. Chapman, an associate of Tham, was named on the application as someone whose conversation might be intercepted. The wiretap expired without renewal on May 20, 1987, and on May 21, 1987 Judge Peckham signed an order terminating the wiretap. 7 Tr. 917-919, 929, 933-35; Pet. at 5a.[2]

[2] Many of the facts in this Statement of the Facts are drawn directly from the *en banc* panel's opinion, which adequately and accurately sets forth the relevant facts. *See* Pet. at 2a-7a, 16a.

On July 9, 1987, an FBI agent assigned to Chapman observed Judge Aguilar eating lunch with Chapman, who had a criminal record. 7 Tr. 964-69. Soon thereafter, on August 5, 1987, the Special Agent in charge of the FBI's San Francisco office visited Judge Peckham and told him that Judge Aguilar had been seen in Chapman's company. 7 Tr. 920, 938, 986, 1010.

Four days later, Judge Peckham met Judge Aguilar at a social function and told him that Abie Chapman's name had come up "in the course of" or "in connection with" a wiretap application. 7 Tr. 921, 942. Judge Aguilar responded that he "[knew] the old man." 7 Tr. 921, 942-43; *see also* 9 Tr. 1213-14. In fact, Chapman was married to Josephine Knaack, an old friend of the Aguilar family and the mother of Judge Aguilar's sister-in-law. 5 Tr. 821-22; 9 Tr. 1207-08. Judge Aguilar had no other knowledge of the application to intercept Tham's calls, which had by then already expired, and no further conversations with Judge Peckham on this subject. *See* Pet. at 69a, 88a.

Six months later, on February 6, 1988, Chapman invited himself to Judge Aguilar's home. After a few minutes and two drinks, Chapman got up to leave. As Judge Aguilar walked outside with Chapman, he noticed a man sitting in a car across the street, who was holding a camera and attempting to conceal himself from Judge Aguilar. When Chapman drove away, the man followed him. 5 Tr. 802-03, 815; 9 Tr. 1256-58, 1328-29; Pet. at 7a.

Judge Aguilar was understandably concerned by the sight of what appeared to him to be a law enforcement official watching and photographing him at home. *See*

Pet. at 7a. Judge Aguilar knew that Chapman was on his way to visit his stepdaughter, Marilyn Knaack Aguilar, but Judge Aguilar did not have her phone number. Instead, he called his nephew, Steve Aguilar (Marilyn Knaack Aguilar's son) and asked him to come over. 5 Tr. 821-23; 9 Tr. 1271, 1328; Pet. at 7a. When Steve arrived, Judge Aguilar told him that he had seen an FBI agent following Chapman and that he heard at work that telephones might be tapped. He asked Steve to go to his mother's house and personally tell Chapman that he did not want Chapman to call or visit him any more. Steve Aguilar relayed the message. 5 Tr. 824-26, 832; 9 Tr. 1272-73; Pet. at 7a. There was no evidence that Chapman's phone lines were ever tapped, and the only wiretap of which Judge Aguilar might have had knowledge had expired eight months before. Pet. at 7a.

2. Events Related to the Section 1503 Charge

In late 1987, Chapman and the late Edward Solomon, whom Judge Aguilar knew from law school, visited Judge Aguilar's house with a Section 2255 petition collaterally attacking Tham's conviction for embezzlement, which was then pending before Judge Weigel, Judge Aguilar's colleague. 4 Tr. 602-03, 606, 608, 611, 643; 9 Tr. 1206, 1215-17. Judge Aguilar looked at the motion, advised Solomon (who was representing Tham) to get the case on the calendar and stated that Judge Weigel would give Solomon a "fair shot" on the motion. 4 Tr. 611-13, 646, 651-54, 719-27; 9 Tr. 1215-20.

Although Judge Aguilar inquired of Judge Weigel concerning the status of the Section 2255 petition, Judge

Weigel testified unequivocally that Judge Aguilar made no attempt to influence his ruling on the petition. 9 Tr. 1224-28, 1236-37, 1249; Pet. at 4a. The jury agreed, acquitting Judge Aguilar of the charge that he conspired with Tham, Solomon and Chapman to influence Judge Weigel. Pet. at 4a.

Unlike the jury, the FBI did not believe Judge Weigel when he told them that Judge Aguilar had not acted improperly. Instead, the FBI pressed him to wear a tape recording device to a luncheon that he was to attend with Judge Aguilar in order to record any statement Judge Aguilar made to him. Judge Weigel was highly incensed at the FBI's request and he refused. 9 Tr. 1240-42. Contrary to the implication conveyed by the government's Statement, Pet. at 6, Judge Weigel recused himself from Tham's petition, which he had preliminarily decided to deny, not because of questionable conduct by Judge Aguilar, but because of the FBI's heavy-handed intervention. 9 Tr. 1236, 1245.

The FBI had more luck with Solomon. On May 10, 1988, the FBI approached Solomon, told him that his phones had been tapped, and accused him of obstruction of justice. 4 Tr. 617, 669-74. Although he did not believe that he was guilty of obstruction, Solomon agreed to cooperate because he feared the cost and risk of a trial and he was concerned about previous problems relating to his income tax. *See* 4 Tr. 674, 678-80. Solomon subsequently wore a recording device to two meetings with Judge Aguilar in an attempt to elicit information for the FBI. 4 Tr. 617, 684-85, 687-88; 8 Tr. 1102; *see* App. ER at 4-53. Based on these conversations, the government also charged that Judge Aguilar violated 18 U.S.C. § 1503 by

attempting to induce Solomon to testify falsely. The jury acquitted Judge Aguilar of this charge as well. Pet. at 29a; 15 Tr. 1591.

By virtue of the wiretaps, Solomon's cooperation, the recorded conversations between Judge Aguilar and Solomon, and the interview of Judge Weigel, the FBI was familiar with all the relevant facts concerning Judge Aguilar's relationship with Solomon and Chapman and whether Judge Aguilar had attempted to intervene with Judge Weigel. App. ER at 57. Nevertheless, on June 22, 1988, two FBI agents interviewed Judge Aguilar on these subjects for no apparent purpose other than to induce Judge Aguilar to make the false statements. "There [was] no evidence that a grand jury had authorized or directed the FBI investigation; nor [was] there evidence that the FBI agents had been subpoenaed to testify." Pet. at 18a. Likewise, there was no evidence that the agents ever testified before the grand jury either directly or through the hearsay testimony of others.

Judge Aguilar explained that he was asked by someone, probably Chapman, to find out when there would be a hearing on a motion, and that Judge Aguilar had done so. App. ER at 57-59, 69. In response to an agent's question, Judge Aguilar told them that he had known Solomon since 1955, App. ER at 61, and that he had found out recently that Solomon was Tham's attorney. App. ER at 62. Judge Aguilar said that he did not discuss the Tham matter with Solomon, App. ER at 62, 69, and that he did not find out or learn of any wiretap order on Chapman. App. ER at 70-71. The jury found that some of these statements were false.

The government's Statement implies incorrectly that the FBI agents made Judge Aguilar aware that a grand jury was meeting prior to eliciting the false statements. Pet. at 8. The plain fact that emerges from the transcript of the interview is that Judge Aguilar repeatedly sought to determine whether a grand jury was reviewing the issues that were the subject of the FBI interview and the agents rebuffed or evaded his questions. *See* App. ER at 54-80. Throughout the colloquy that included the statements found to be false, neither the agents nor Judge Aguilar mentioned a pending grand jury proceeding, although Judge Aguilar asked the agents whether he was a target of their investigation. *After* the false statements were made, Judge Aguilar asked again whether he was a "target." On this occasion, an agent answered with a confusing response about grand jury proceedings, but did not directly confirm that a grand jury was meeting or that Judge Aguilar was a subject of its inquiry. *See* App. ER at 73.

Judge Aguilar remained confused about whether a grand jury was in fact pending or merely was being considered. A few moments later, Judge Aguilar asked again whether "a Grand Jury's gonna meet." App. ER at 74. The agent made no effort to clear up the confusion, replying opaquely: "Okay." *Id.* Judge Aguilar later testified that "*[a]fter* the interview was over" it was his "*impression*" that his statements would be reported to the grand jury. 9 Tr. 1360 (emphasis added); *compare* Pet. at 14.

II. REASONS FOR DENYING THE PETITION

This case presents a particularly poor occasion for the Court to exercise its discretionary power of review. Although the government litters its Petition with references to "freshly minted exceptions" and "limitations," it cannot point to a single case supporting the application of 18 U.S.C. § 1503 in circumstances so far removed from any exercise of the grand jury's authority, nor can it identify *any* case decided under 18 U.S.C. § 2232(c), much less one endorsing an interpretation of the statute squarely at odds with its plain terms.

With respect to Section 1503, moreover, review of Judge Aguilar's conviction would be an empty exercise. The Petition fails to acknowledge that Judge Aguilar's conviction on the obstruction count was reversed by a panel of the Ninth Circuit on independent and unassailable grounds. Just as important, shortly after the conduct for which Judge Aguilar was charged under Section 1503, Congress, through amendment to 18 U.S.C. § 1512, explicitly undertook to resolve a conflict about the overlap between the omnibus clause of Section 1503, under which Judge Aguilar was charged, and Section 1512, which dealt specifically with interference with witnesses. By this amendment, Congress made clear that it intended to address questions such as the one presented here through specific provisions in Section 1512 *and not* through the omnibus clause of Section 1503. Review by this Court would be a matter of historical curiosity only: it would not even affect the outcome of this case, much less any other.

The Ninth Circuit's ruling on Section 2232(c) is an even less worthy object of the Court's certiorari power. The proceedings below are the first and only reported proceedings applying Section 2232(c). Without support from the language of the statute, the decisions of other courts, or even meaningful legislative history, the government asks this Court to reconsider an interpretation that conscientiously comports with the statute's express terms.

Together, the best that can be said about the issues presented by the government for review is that consideration of the scope of the omnibus clause of Section 1503 comes too late, while speculation about the outer limits of Section 2232(c) comes too soon. Neither issue merits review by this Court.

A. Section 1503

By its Petition, the government seeks the Court's endorsement of an application of Section 1503 that was nothing more than an adventure in artful pleading, unsupported by the terms of the statute, prior judicial decision, or even a compelling government interest. Although all parties agree that the interests implicated by Judge Aguilar's conduct are directly addressed, if at all, by 18 U.S.C. § 1001 (false statements to government agencies), the government eschewed the use of this statute because Section 1001 is not a predicate act of "racketeering activity" for the purposes of its RICO charge. *See* 18 U.S.C. § 1961(1). Although the RICO charge has long-since been abandoned and the underlying accusations

against Judge Aguilar resolved by acquittals, the government persists in its effort to apply Section 1503 to circumstances where it does not fit, was never before applied, and now may no longer be used.

1. Review of This Case Will Not Resolve the Issue Presented or the Outcome of the Prosecution

Before this Court can reach the narrow question of whether simple false statements to an investigator may be said to "obstruct or impede the due administration of justice," the Court would be required first to resolve the threshold question of whether Section 1503 addresses *any* conduct relating to potential witnesses, much less the particular type of conduct alleged here. Although that question was, at the time of the conduct giving rise to the charges against Judge Aguilar, the subject of a split among the Circuits, Congress later amended the statutory scheme and clearly expressed its intent that Section 1512, *not* Section 1503, govern such conduct. The issue presented here is thus purely historical as it relates to the application of Section 1503.

As this Court is well aware, the omnibus clause of Section 1503 does not stand as the last or only protection against obstructive conduct, but instead forms only a small part of a comprehensive statutory scheme designed to protect a broad array of interests.[3] In particular,

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[3] *See, e.g.*, 18 U.S.C. §§ 1501 (process servers); (judges, court officers, and jurors); 1505 (Executive Branch agencies and Congressional Committees); 1509 (court orders); 1510 (criminal investigations); 1511 (state or local law enforcement); 1512

Congress has spent the better part of a decade refining the terms under which violent, coercive, or misleading conduct toward witnesses or potential witnesses may be punished as obstruction of justice. As originally enacted, Section 1503 expressly included witnesses among those whom it protected. *See* Pet. at 19a & n.5 (quoting original text of Section 1503); 62 Stat. 769, 18 U.S.C. § 1503 (1948). In 1982, as part of the Victim and Witness Protection Act, Congress amended Section 1503 to its present form by eliminating *all* references to witnesses;[4] it simultaneously added Section 1512, which was specifically tailored to

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(witnesses, victims and informants); 1513 (same); 1514 (civil actions to restrain harassment of victims and witnesses).

[4] Section 1503 provides:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1503.

address witness tampering. *Id*; Victim and Witness Protection Act, Pub. L. No. 97-291, 96 Stat. 1249 (1982). As first enacted, Section 1512 only proscribed the use of intimidation, physical force, threats or misleading conduct. 18 U.S.C. § 1512 (1985). The circuits interpreting the statutory scheme split over whether non-coercive witness tampering not expressly covered by Section 1512 could be prosecuted under the omnibus clause of Section 1503 after the enactment of 1512.[5] In 1985, over the dissent of three of its members, this Court expressly declined to resolve that disagreement. *Cooper v. United States*, 471 U.S. 1130, 1130-31 (1985) (White, J., Brennan, J., and Marshall, J., dissenting).

Three years later, Congress intervened finally to resolve the conflict. In 1988, several months after the conduct at issue here, the Criminal Law and Procedure Minor Substantive and Technical Amendments Act of 1987 was enacted, which amended Section 1512 to include generic non-coercive behavior towards witnesses – "corrupt[] persua[sion]" – within the class of proscribed behavior. *See* Criminal Law and Procedure Minor Substantive and Technical Amendments Act of 1987, Pub. L. No. 100-690 (1987); 18 U.S.C. § 1512(b). This is, of course, precisely the term of the omnibus clause of Section 1503 upon which the government relied to prosecute Judge

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[5] *Compare United States v. Hernandez*, 730 F.2d 895, 899 (2d Cir. 1984); *United States v. King*, 762 F.2d 232 (2d Cir. 1985), *cert. denied*, 475 U.S. 1018 (1986) *with United States v. Lester*, 749 F.2d 1288, 1295-96 (9th Cir. 1984); *United States v. Rovetuso*, 768 F.2d 809 (7th Cir. 1985), *cert. denied*, 474 U.S. 1076 (1986); *United States v. Wesley*, 748 F.2d 962 (5th Cir. 1984), *cert. denied*, 471 U.S. 1130 (1985).

Aguilar. As the House Report accompanying the act confirms, Congress intended to "resolve[] [the circuit] conflict by amending 18 U.S.C. 1512(b) to proscribe 'corrupt persuasion.' " H.R. Rep. No. 100-169, 100th Cong., 1st Sess. (1987) at 12. The report continues:

> It is intended that culpable conduct that is not coercive or "misleading conduct" be prosecuted under 18 U.S.C. 1512(b), rather than under the [omnibus] clause of 18 U.S.C. 1503. [The amendment], therefore, will permit prosecution of such conduct in the Second Circuit, where such prosecutions cannot now be brought, and will in other circuits result in prosecutions being brought under 18 U.S.C. 1512(b).

Id. This legislative history simply confirms what is obvious from the language of the amendments: Section 1512 and not Section 1503 now governs *all* forms of witness tampering.[6]

In sum, the best that can be said for the issue presented by the government is that it has no continuing relevance. Congress has clearly evidenced its intent to address all potentially obstructive conduct towards witnesses, including "corrupt persuasion," in the context of Section 1512, not Section 1503. The question presented by

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[6] Congress did not amend the omnibus clause of Section 1503 in 1987, nor need it have done so in order to achieve its stated objective. The omnibus clause continues to serve other important purposes unrelated to witnesses even after the enactment of Section 1512 and the 1987 amendments to it. It is difficult to imagine another way for Congress to have accomplished its purpose, short of eliminating the omnibus clause altogether, which would have curtailed Section 1503 in ways Congress obviously did not intend.

the government's Petition – whether "false and misleading statements to prospective witnesses" constitute obstruction of justice – must now of necessity be resolved according to, or at least with reference to the amended terms of Section 1512(b); and that question cannot conceivably be addressed through this prosecution.[7] The only question presented in this case is whether such conduct violated Section 1503 prior to the amendment of Section 1512. Having declined to address the interplay between Sections 1503 and 1512 in *Cooper*, when it could be said to have mattered, it hardly makes sense for the Court to revisit that issue now in order to decide the narrow question of whether the novel use of Section 1503 in this case was appropriate.

Although the government cites "the importance of this prosecution" as a basis for granting review, the conviction of Judge Aguilar under Section 1503 cannot be saved by review of the issue presented by the government. Before the Court of Appeals set this case for *en banc* review, the panel hearing the cross-appeals had already reversed Judge Aguilar's conviction under Section 1503 on independent grounds, holding that the jury instruction defining knowledge impermissibly shifted the burden of

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[7] It is possible, of course, that the government takes the position in this Court that, notwithstanding the irrefutable evidence of contrary legislative intent, Section 1503 *still* covers non-coercive witness tampering. While that argument would have the virtue of presenting a live question, it cannot be answered through Judge Aguilar's prosecution, which must be addressed according to the statutory landscape as it existed before the 1988 amendments to Section 1512(b).

proving an essential element of the offense to the defendant and erroneously lowered the government's burden of proof. Pet. at 77a-86a; 104a-105a. Relying both on the paucity of evidence that Judge Aguilar had any knowledge of the pendency of a grand jury proceeding or that the agents might appear before it as witnesses, as well as this Court's recent decision in *Sullivan v. Louisiana*, 113 S. Ct. 2078 (1993), the panel concluded that this error was not harmless as to the Section 1503 conviction. Pet. at 86a-90a; 104a-105a. Although the *en banc* court declined to reach this issue, the government can offer no plausible grounds to disturb that result and has not suggested that this issue also warrants this Court's review.

2. No Court Has Ever Construed Section 1503 to Cover Conduct that is Wholly Unconnected With Any Exercise of Grand Jury Authority

Although the government refers glibly to "freshly minted exceptions" to Section 1503, it cannot point to a single case in which simple false statements to *any* potential witness or false statements to law enforcements agents who were not acting on behalf of a grand jury have *ever* been punished under Section 1503.

Far from constituting a "freshly minted exception," the decision of the Ninth Circuit in this case is consistent with all prior decisions applying Section 1503, including every case identified by the government: every single court to construe Section 1503 has required a direct nexus between the conduct alleged to be criminal and the lawful exercise of the grand jury's authority. Thus, as the

government notes, the courts have routinely applied Section 1503 to false testimony to the grand jury, *United States v. Langella*, 776 F.2d 1078 (2d Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986), its investigator, *United States v. Hawkins*, 765 F.2d 1482 (11th Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986), as well as to efforts to defeat the grand jury's subpoena power by altering, destroying or concealing evidence, *United States v. McComb*, 744 F.2d 555 (7th Cir. 1984) (alteration of documents subpoenaed by grand jury); *United States v. Shoup*, 608 F.2d 950, 959-63 (3d Cir. 1979) (falsification of evidence by contractor hired to assist grand jury investigation); *United States v. Walasek*, 527 F.2d 676 (3d Cir. 1975) (destruction of documents subpoenaed by grand jury); Pet. at 14-15.

The courts thus have been vigilant in protecting the authority of the grand jury, whether it acts directly or through an intermediary; at the same time, however, they have consistently refused to conflate the independent functions of the FBI, on the one hand, and the grand jury, on the other. The courts have rebuffed efforts to shoehorn within Section 1503 conduct that does *not* implicate the exercise by the grand jury of its authority to compel the truthful testimony of witnesses or the production of documents. *See United States v. Brown*, 688 F.2d 596, 598 (9th Cir. 1982) ("the obstruction of a government agency's investigation is insufficient to trigger § 1503"); *United States v. Simmons*, 591 F.2d 206, 208 (3d Cir. 1979) (obstruction of an FBI investigation does not violate Section 1503); *United States v. Fayer*, 573 F.2d 741, 745 (2d Cir.) (same), *cert. denied*, 439 U.S. 831 (1978).

Both the decision of the Court of Appeals below as well as the decision of the Court of Appeals for the

Fourth Circuit in *United States v. Grubb*, 11 F.3d 426 (4th Cir. 1993), upon which the government relies to assert a conflict among the circuits, are consonant with this principle. In *Grubb*, the indictment alleged that "the Grand Jury was assisted in this investigation by Special Agents of the FBI . . . ", 11 F.3d at 436 n. 15, and the evidence showed that the grand jury investigation was "being conducted through this FBI agent." *Id.* at 436. By contrast, the Court of Appeals below found that "[t]here [was] no evidence that a grand jury had authorized or directed the FBI investigation; nor [was] there evidence that the FBI agents had been subpoenaed to testify." Pet at 18a. Rather, the government explicitly based its prosecution on the premise that the FBI agents were *not* acting for or on behalf of the grand jury. 10 Tr. 1632-33. Instead, the only nexus between the agents and the grand jury that the government identifies is that the agents were potential witnesses. Pet. at 15.

The unanimous decision of the Ninth Circuit *en banc* in this case thus does no violence at all to the principle consistently recognized by the Courts to determine when Section 1503 may be applied, nor is it inconsistent with the reasoning of the Fourth Circuit in *Grubb*.[8] By contrast, the rule advocated by the government would vastly expand the scope of Section 1503. In the absence of any proof that the FBI agents here were or were intended to

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[8] We are, frankly, at a loss to explain the mention in *Grubb* of a conflict with the Ninth Circuit, since it refers to the decision by the panel in this case that did not decide the question ultimately resolved by the Ninth Circuit *en banc*. *See Grubb*, 11 F.3d at 437 n.20.

be grand jury witnesses, the rule advocated by the government would treat any interference with the FBI's evidence-gathering function as an obstruction of the grand jury. It would for the first time sweep within Section 1503 all potentially false or misleading statements to law enforcement investigators, regardless of whether the investigations were moored in any fashion to the grand jury's exercise of its authority. Such an unprecedented expansion of the statute is wholly unwarranted by the consistent decisions of every court to consider Section 1503. It would, moreover, swallow whole Congress' efforts to refine questions relating to the obstruction of potential witnesses through Section 1512(b), notwithstanding Congress' clear efforts to avoid this result. It would accomplish these objects, finally, without protecting a single articulable government interest not already addressed directly through other statutes.

The use of Section 1503 in this case was unfortunate, unprecedented, unwarranted and ill-conceived. The unanimous decision of the *en banc* Court does not merit further review.

B. Section 2232(c)

In a case of first impression, although of no special importance, the government asks the Court to construe Section 2232(c) contrary to its plain terms based upon a supposed legislative purpose unexpressed in the statute or its legislative history. Section 2232(c) protects the secrecy of authorizations to intercept electronic communications while such authorizations are in effect or while

applications for authorization are pending. Once a wiretap authorization has expired, or an application for authorization has been denied, Section 2232(c) no longer prohibits its disclosure. While the government might assert a limited interest in protecting the secrecy of expired wiretaps, Congress expressly confined Section 2232(c) to pending or ongoing wiretap authorizations. The government does not supply a reasoned interpretation of the language, a single precedent, or legislative history that would dictate a contrary result. This Court's review is wholly unwarranted.

1. The Plain Language of Section 2232(c) is Inconsistent with the Interpretation the Government Proposes and the Interests it Seeks to Protect

18 U.S.C. § 2232(c) provides:

> Whoever, having knowledge that a Federal investigative or law enforcement officer has been authorized or has applied for authorization under chapter 119 to intercept a wire, oral, or electronic communication, *in order to obstruct, impede or prevent* ***such interception***, gives notice or attempts to give notice of ***the possible interception*** to any person shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 2232(c) (1988) (emphasis supplied). In the only reported opinion to construe this provision, the *en banc* court confirmed what is clear from the plain language of the statute: "the purpose of the statute is to prevent interference with 'possible interception.' " Pet. at 9a. Once a wiretap has expired or been denied, the Ninth

Circuit reasoned, there is no "possible interception" to disclose or to attempt to disclose. *Id.* The "plain language" of Section 2232(c) does not prohibit the conduct alleged in this case. *Id.* That narrow purpose is further evidenced by the statute's intent requirement, which limits punishable disclosures to those undertaken with intent to interfere with "such interception" of which the defendant has knowledge. *See id.* Under the circumstances, the disclosure of an expired wiretap not only fails to violate the terms of the statute, it also fails to implicate any interest protected by Section 2232(c).

The Petition is completely devoid of a reasoned, alternative explanation accounting for all the terms of the statute. The government simply reads the phrase "possible interception" out of the statute. It baldly asserts that "there is no basis in the statutory language for the court of appeals requirement that [] obstruction be *possible* at the time the disclosure was made." Pet. at 23 (emphasis supplied). Even in its own flawed argumentation, the government cannot avoid using the very language of the statute to express the requirement it inexplicably claims to be unable to locate. The government likewise simply ignores the limited intent requirement, or as it did below, asserts incorrectly that the statute punishes disclosures designed to interfere with government investigations. *See* Brief For the United States of America (Aug. 9, 1991) at 38-39. The government's reading of Section 2232(c) violates "the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect." *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992). As the Ninth Circuit concluded,

the interpretation of Section 2232(c) that the government urges on this Court is not even "reasonable." Pet. at 8a.

2. The Government Provides No Meaningful Authority that Would Contradict the Plain Meaning of Section 2232(c)

The government provides literally no precedent, even by analogy, that might suggest that Section 2232(c) has a broader meaning or purpose than its terms reflect. *See* Pet. at 20-25. Essentially, the government relies on a *single* piece of evidence to make its case: "an isolated phrase in a Senate Committee Report." Pet. at 10a; *see* Pet at 23-24. Given the unambiguous terms of Section 2232(c), resort to legislative history is inappropriate. *See Sullivan v. Stroop*, 496 U.S. 478, 482 (1990); *United States v. Turkette*, 452 U.S. 576, 580 (1981). As the *en banc* court noted, "[i]t is only if the language is unclear that [a court] refer[s] to legislative history as an aid to statutory interpretation." Pet. at 10a (citing *Blum v. Stenson*, 465 U.S. 886, 896 (1984)).

Even if resort to legislative history were appropriate, the Senate Report does little to advance the government's cause. In summarizing Section 2232(c), the Senate Report on which the government relies notes that "[t]he defendant must engage in conduct of giving notice of the possible interception to any person who *was* or is the target of the interception." *See* S. Rep. No. 541, 99th Cong., 1st Sess. 1, 34 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3588; Pet. at 23 (emphasis supplied). From the use of the single word "was," the government contends that Section 2232(c) was intended to reach expired wiretaps. *See* Pet. at 23-24.

The most that can be said for the sentence on which the government relies, however, is that it represents a sloppy effort to capture the terms of Section 2232(c). It describes a statute broader in some respects and narrower in others than the provision Congress actually enacted. By its plain terms, the statute does not reach disclosures to someone who "was" a target of the interception, since it encompasses only "possible interception[s]." At the same time, the statute is plainly not limited, as the report suggests, only to disclosures to the "target of the interception." Rather, as all parties agree, the statute reaches disclosures made to *anyone* with the intent to impede the known interception.[9]

3. The First Amendment and the Rule of Lenity Preclude the Government's Interpretation

The government's interpretation of Section 2232(c) also runs afoul of the First Amendment and the Rule of Lenity. This Court has made clear time and again that where the interests of the First Amendment and the government collide, the government bears the burden of

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[9] The government's reliance on the fact that Section 2232(c) punishes attempted disclosures, *see* Pet. at 24, is a red herring. Contrary to the government's assertion, the Ninth Circuit did *not* find that "the statute requires proof that the defendant be shown to have succeeded in obstructing the interception of a wire communication." *Id.* at 23; *compare id.* at 12a-13a. There is no dispute that Section 2232(c) punishes the "attempts to give notice of [a] possible interception." 18 U.S.C. § 2232(c). "The issue in this case is not whether Judge Aguilar attempted to disclose prohibited wiretap information, but whether the wiretap information he did disclose was prohibited." Pet. at 13a.

demonstrating a compelling "state interest of the highest order" before it may punish the disclosure of information. *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979). It may be that under certain circumstances, the government can assert a compelling interest in preventing the disclosure of the existence of a wiretap authorization or application.[10]

However, the issue here is not whether the government *ever* could identify such an interest, but whether it can identify such an interest, consistent with the statute, for a wiretap that has long-since expired.[11] Before the Ninth Circuit, the government argued that it had a compelling interest in protecting law enforcement interests

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[10] That question is not free from doubt. The Court has specifically reserved the question of whether the First Amendment permits the criminal punishment of "one who secures . . . information by illegal means and thereafter divulges it." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837 (1978).

[11] The interest that the government identifies also must be consistent with the facts of this case. As the government has acknowledged, *see* Pet. at 43a, 87a, 91a, at least a substantial portion of Judge Aguilar's suspicions about electronic surveillance arose from the fact the government chose to conduct a public surveillance of Chapman from a car parked in front of Judge Aguilar's house. It would be "highly anomalous" to punish Judge Aguilar for commenting upon activities the government chose to conduct in public. *See The Florida Star v. B.J.F.*, 491 U.S. 524, 535 (1989). The First Amendment requires the government to demonstrate that it has eliminated the risk of wrongful disclosure "through careful internal procedures" before it may impose criminal penalties on outsiders. *Landmark Communications, Inc.*, 435 U.S. at 845. This Court has yet to identify a circumstance in which the government has met its burden.

generally or in future efforts at electronic surveillance. *See* Brief for the United States of America (Aug. 9, 1991) at 38-39; *see also* Pet. at 39a. Recognizing that Section 2232(c) does not even purport to protect these interests – since by its terms it protects only attempts to interfere with the particular interception that has been disclosed – the government has retreated from that argument here. Instead, it now argues that it has a compelling interest in the protection of the secrecy of extensions and re-authorizations of wiretaps. Pet. at 22. That interest, however, is not even arguably implicated by the government's efforts to apply Section 2232(c) to the facts of this case. The wiretap application of which Judge Aguilar allegedly was aware resulted in an interception that terminated 30 days after it was begun, Pet. at 5a; it was never extended or re-authorized, *id.*, and had been completely defunct for nearly eight months when the alleged disclosure was made. *Id.*

There may come a time when this Court is presented with the question of whether disclosure of an application or authorization for a wiretap violates Section 2232(c) when the wiretap has been extended or re-authorized. At that time, this Court also will be called upon to decide whether such an interpretation conflicts with the First Amendment. But this is, indisputably, not such a case. Despite its repeated efforts, the government cannot identify an interest within the reach of Section 2232(c) that would warrant punishing the disclosure of expired wiretaps. Its utter failure fully supports the Ninth Circuit's refusal to embrace a Constitutional confrontation by

broadly construing Section 2232(c). *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).[12]

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[12] As the Ninth Circuit noted in conclusion, even if the government's interpretation of Section 2232(c) were possible because of some ambiguity, "the more lenient construction is required." Pet. at 24a-25a. This Court has long emphasized that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347 (1971) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). Thus, if any "reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history and motivating policies' of the statute," *Moskal v. United States*, 498 U.S. 103, 108 (1990), it should be construed narrowly. *See also United States v. Granderson*, 114 S. Ct. 1259, 1267 (1994).

III. CONCLUSION

For the foregoing reason, Respondent respectfully asks that the Petition for Certiorari be denied.

Respectfully submitted.

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No. 94-270

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT P. AGUILAR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

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1. Respondent's primary argument opposing certiorari is that, in respondent's view, the Ninth Circuit's construction of 18 U.S.C. 1503 "has no continuing relevance." Br. in Opp. 16. In 1988, Congress amended another statute defining certain witness tampering offenses—18 U.S.C. 1512(b), see App., *infra*, 1a-2a—to extend it to offenses involving the "corrupt[] persuas[ion]" of witnesses.[1] Congress did not at that time amend Section 1503. Respondent acknowledges that this case presents the question "whether [respondent's] conduct

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[1] Respondent states that "corrupt[] persua[sion]"—the term added to Section 1512(b)—was "precisely the term of the omnibus clause of Section 1503 upon which the government relied to prosecute Judge Aguilar." Br. in Opp. 15-16. The term "corrupt" was and is part of the omnibus clause of Section 1503. See Pet. 2. But neither the term "persua[sion]" nor any of its variants appeared in any modern version of Section 1503.

violated Section 1503 prior to the amendment of Section 1512." Br. in Opp. 17. But respondent argues that "it hardly makes sense for the Court to revisit that issue now," because the 1988 amendments would govern future cases of this sort. *Ibid.*

Nothing in the language or legislative history of the 1988 amendment to Section 1512(b) would have any effect on a prosecution such as this one under Section 1503. The 1988 amendment simply substituted the term "threatens, or corruptly persuades" for the term "threatens" in Section 1512(b). As stated in the committee report on which respondent relies, that substitution was intended to make clear that cases of "corrupt persuasion" could and should thenceforth be brought under Section 1512(b). See Br. in Opp. 16. This, however, was not a case of "corrupt persuasion"; respondent was not alleged to have persuaded, or attempted to persuade, the FBI agents to make false statements to the grand jury. Instead, he was charged with attempting to obstruct the grand jury's investigation by making false statements to the FBI agents, with the intent that those statements be reported to the grand jury. The 1988 amendment to Section 1512(b) had nothing to do with that charge, and the question that respondent concedes is presented in this case accordingly remains an important one.

In any event, respondent's argument essentially reduces to the proposition that Congress effected a partial implied repeal of Section 1503's omnibus clause when it amended Section 1512(b) in 1988 or, perhaps, when it first enacted Section 1512(b) in 1982. As this Court has frequently explained, "[i]t is, of course, a cardinal principle of statutory construction that repeals by implication are not favored." *Randall* v. *Loftsgaarden*, 478 U.S. 647, 661 (1986); see, *e.g.*, *TVA* v. *Hill*, 437 U.S. 153, 190 (1978); *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974); *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936). Neither of the long-recognized exceptions to that rule—where there is "irreconcilable conflict" between the

two statutes or where "the later act covers the whole situation of the earlier one and is clearly intended as a substitute," see *Randall*, 478 U.S. at 661—would apply to the statutes at issue in this case. And if a partial repeal cannot be implied from the language of the statute, still less could it be implied from the comments of a congressional committee, upon which respondent places sole reliance. It is a familiar principle in the criminal law that the same conduct may constitute an offense under two distinct statutes, and the law is clear that in such a situation the government has the option of proceeding under either one. See, *e.g.*, *United States* v. *Batchelder*, 442 U.S. 114, 123-126 (1979) (citing cases); *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 45-46 (1952).

That the controversy concerning the meaning of Section 1503 remains alive is apparent from the Fourth Circuit's decision in *United States* v. *Grubb*, 11 F.3d 426 (1993). As we explain in the petition, see Pet. 18-19, the facts of *Grubb* are remarkably similar to the facts of this case: the prosecution under Section 1503 of a sitting judge for obstruction of a grand jury investigation, based on false statements he made in a tape recorded interview with FBI agents investigating corruption. The false statements at issue in *Grubb* were made on October 8, 1991, see 11 F.3d at 437, well after the 1988 amendment. Similarly, the false statements to FBI agents that formed the basis of the Section 1503 count in *United States* v. *Wood*, 6 F.3d 692 (10th Cir. 1993), occurred in 1989, see *id.* at 693, and therefore also post-dated the amendment to Section 1512(b). See Pet. 20 (discussing *Wood*).

2. Respondent asserts that the Fourth Circuit's decision in *Grubb* does not conflict with the Ninth Circuit's decision in this case, because in *Grubb* the indictment alleged that "the Grand Jury was assisted in this investigation by Special Agents of the FBI" and the evidence showed that the grand jury investigation was "being conducted through this FBI agent." Br. in Opp. 20 (quoting opinion in *Grubb*). In res-

pondent's view, those facts were not present in this case and the two cases can therefore be harmonized.

The facts of this case are virtually identical to those of *Grubb*. To be sure, the indictment in this case did not expressly allege that the FBI agents were assisting the grand jury investigation, nor is there any requirement that an indictment under Section 1503 must explain the details of the relationship between the defendant's conduct and the grand jury investigation. But there was ample evidence that the FBI agents to whom respondent made the false statements were assisting a grand jury investigation. The foreperson of the grand jury testified at trial that both of the agents to whom respondent made his false statements—Agents Carlon and Noel—appeared before the grand jury, 6 Tr. 890, and that she was "familiar" with numerous other FBI agents involved in this case, *id.* at 896. In the tape recorded conversation between Solomon and respondent on May 26, 1988, prior to respondent's interview with the FBI agents, Solomon informed respondent that FBI agents had met with him and said that "there's a grand jury goin' on now" and that "they'd be back with a subpoena for the grand jury." Resp. C.A. E.R. 39, 40.[2] In addition, one of the agents himself told respondent that "I'd have to say yes, you know, um there is a Grand Jury meeting," and that "some evidence will be heard I'm . . . I'm sure on this issue." *Id.* at 73. When respondent asked a further question about the grand jury investigation, the agent replied "I don't know if I can tell you that. I mean what's . . . is there a 6(e) rule prohibiting me from telling you that?" *Ibid.* Federal Rule of Criminal Procedure 6(e) protects the secrecy of grand jury proceedings, and the agent's statements

[2] Respondent immediately understood the significance of the grand jury investigation, commenting that "if they subpoena me I may have a problem. A real problem explaining my discussions with Judge Weigel." Resp. C.A. E.R. 43.

surely provided evidence that he was assisting the grand jury investigation.

Respondent seizes upon the Ninth Circuit's comment that "[t]here is no evidence that a grand jury had authorized or directed the FBI investigation; nor is there evidence that the FBI agents had been subpoenaed to testify," Pet. App. 18a, and argues that those comments distinguish this case from *Grubb*. Br. in Opp. 20. They do not. Ordinarily grand juries neither specifically authorize nor specifically direct FBI agents who are assisting investigations, and there was no evidence that the grand juries either in this case or in *Grubb* did so. Indeed, this Court has explained that the government has no authority to swear law enforcement agents in as "'agents' of the grand jury," and that such agents are ordinarily "aligned with the prosecutors." *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 260 (1988). Nor does a grand jury ordinarily have any need to issue subpoenas to FBI agents, who can be expected to appear voluntarily when called. In short, insofar as it is of importance, the evidence in this case demonstrated that the relationship between the FBI agents and the grand jury was identical to that in *Grubb*: FBI agents were working in conjunction with the prosecutors to "assist[]" a grand jury in gathering evidence. See 11 F.3d at 436 n.15.

In any event, the *Grubb* court explained that the false statements to the FBI agents constituted obstruction of justice not because of some special and unusual relationship between the agents and the grand jury, but because the false statements were equivalent to other kinds of efforts to influence a witness to give false testimony. The Fourth Circuit explained that the defendant's conduct violated Section 1503 because his "false statements to the FBI agents are not significantly different from influencing a witness before the grand jury to give false testimony." 11 F.3d at 438. As the court stated, "[t]he effect, that of obstructing the

Grand Jury investigation, is the same." *Ibid.* The Fourth Circuit's affirmance of the Section 1503 conviction in *Grubb* is in direct conflict with the Ninth Circuit's reversal of the Section 1503 conviction in this case.

3. Respondent states that review is unwarranted in this case because the divided Ninth Circuit panel that first heard this case reversed respondent's Section 1503 conviction on other grounds. Br. in Opp. 17-18. Respondent neglects to mention that the panel opinions were withdrawn when the Ninth Circuit decided to hear the case *en banc*, see 11 F.3d 124 (1993), and that the *en banc* court of appeals expressly declined to reach the question that formed the basis of the panel's reversal of the Section 1503 conviction. See Pet. App. 25a. Respondent's speculation as to how the Ninth Circuit would resolve the knowledge issue on remand has no bearing on whether the questions now presented to this Court warrant further review.

4. In the petition, we explain that, under the plain language of Section 2232(c), the government must prove that the defendant knew that there had been an authorization or application for a wiretap; that the defendant intended to obstruct, impede, or prevent the "possible" interception for which authorization had been given or application made; and that the defendant gave notice or attempted to give notice of the possible interception. Pet. 21. We continue to believe that the additional requirement added by the court of appeals—that, at the time the defendant gave notice, the original, unextended application or authorization of which defendant had notice was in fact still in effect—is not consonant with the language of the statute and is directly contradicted by its legislative history.

Respondent errs in arguing that our interpretation of 18 U.S.C. 2232(c) "reads the phrase 'possible interception' out of the statute." Br. in Opp. 23. Our interpretation fully recognizes that the defendant has to "give notice of the

possible interception." The effect of the term "possible" in that phrase is that there need not be any actual interception occurring. For example, where the defendant merely finds out about an application for a wiretap but does not know whether it has been authorized, the statute prohibits disclosure of the "possible interception." So long as it is "possible," from the defendant's point of view, that a wiretap is occurring and the defendant gives notice with intent to obstruct it, the violation is made out.

Indeed, as we explain in the petition, although the interception need be "possible," the obstruction need not be, for there is no reason to engraft a defense of factual impossibility on to the statute. See Pet. 23 ("there is no basis in the statutory language for the court of appeals' requirement that such *obstruction* be possible at the time the disclosure was made") (emphasis added). There can be many reasons why an obstruction would not be possible, including failure of the application to be approved in the first place, malfunction of the wiretap equipment, or termination of the wiretap. See Pet. App. 26a-27a (Fernandez, J., dissenting). None of those circumstances provides a defense, where the defendant has otherwise violated the statutory prohibition, so long as the defendant "g[a]v[e] notice of the possible interception to any person who *was* or is the target of the interception." S. Rep. No. 541, 99th Cong., 2d Sess. 34 (1986) (emphasis added).[3] *A fortiori*, the fact that the wiretap has expired and then been reauthorized—as occurred in this case—at the time the defendant makes his disclosure does not constitute a defense.[4]

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[3] Respondent certainly believed that a wiretap was possible at the time he made the disclosure. See Pet. App. 25a-26a & n.2. As he stated to Solomon in a taped conversation on May 17, 1988, "Oh yeah the phone's definitely tapped. * * * Absolutely." Resp. C.A. E.R. 17.

[4] Respondent cites the court of appeals' opinion for the proposition that "[t]he wiretap application of which [respondent] allegedly was aware

Respondent appears to argue that the First Amendment protects respondent's right to disclose confidential law enforcement information he obtained in his official capacity as federal judge because "at least a substantial portion of [respondent's] suspicions about electronic surveillance arose from the fact that the government chose to conduct a public surveillance of Chapman from a car parked in front of [respondent's] house." Br. in Opp. 26 n.11. Initially, we never "acknowledged" that respondent's suspicions "arose" from his observation of the surveillance vehicle. See *Ibid.* To the contrary, the evidence at trial established that, though respondent's memory may have been jolted by his observation of the surveillance vehicle, respondent's knowledge of the electronic surveillance "arose" entirely from Judge Peckham's statement to him that he had recently reviewed a wiretap application involving Chapman.[5]

Equally important, although respondent may be correct that it would be "'highly anomalous' to punish [respondent] for

---

resulted in an interception that terminated 30 days after it was begun," and that "it was never extended or reauthorized." Br. in Opp. 27. Nothing in the statute, however, requires that the wiretap be in existence at the time the disclosure was made. In any event, the dispute about the proper characterization of the history of the wiretap in this case is merely semantic. The court of appeals characterized the wiretap as having "expired" and stated that "other" wiretaps were later authorized. Pet. App. 5a. The "[o]ther" wiretaps, however, included the same telephone number and an overlapping, though changing, list of interceptees. As we characterized the same facts, the original wiretap was terminated and then was reauthorized, terminated again, reauthorized again, and then extended. See Pet. 22 n.5.

[5] Judge Peckham testified that he told respondent "that in the course of a wiretap application that the name Abie Chapman had come up." 7 Tr. 921. And respondent's nephew, who conveyed the information about the wiretap from respondent to Chapman, testified that when respondent told him about the wiretap just after having observed the FBI surveillance, respondent "did say that he had overheard at work about the possibility of [Chapman's] phone being wiretapped." 5 Tr. 825.

commenting upon activities the government chose to conduct in public," Br. in Opp. 26 n.11, the wiretap at issue in this case was not conducted in public. Had respondent merely informed Chapman that a law enforcement agent appeared to be following him, it would perhaps have constituted an error of judgment, not a criminal offense. But respondent was charged in this case with informing Chapman of the possible interception of his conversations, a fact that respondent learned in his official capacity. Nothing about the wiretap or the application was in any sense public. Indeed, Judge Peckham signed a series of orders postponing the service of notices of the wiretap on the interceptees and maintaining the secrecy of the wiretap through April 25, 1989. 7 Tr. 918-919.

5. Respondent charges that we have mischaracterized the trial record. Br. in Opp. 4-5. The facts, of course, are to be taken in the light most favorable to the verdict, which in this case was guilty on two counts. See, *e.g.*, *Evans* v. *United States*, 112 S. Ct. 1881, 1884 (1992); *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). The fact that respondent was acquitted on other charges—and, in particular, on the conspiracy charge—has no effect on that rule. That is because the basis for the acquittals cannot be known—*i.e.*, whether the jury had a reasonable doubt about a fact the government had to prove or reached its verdict through "mistake, compromise, or lenity." *United States* v. *Powell*, 469 U.S. 57, 65 (1984). Indeed, even an acquittal on the ground that the jury had a reasonable doubt as to an essential fact would not establish that the jury found that fact to be false. See *Dowling* v. *United States*, 493 U.S. 342, 348-350 (1990).

Respondent specifically identifies only two areas of alleged "mischaracterization." First, respondent states that "[c]ontrary to the implication conveyed by the government's Statement, Pet. at 6, Judge Weigel recused himself from Tham's petition * * * not because of questionable conduct by Judge Aguilar, but because of the FBI's heavy-handed intervention.

9 Tr. 1236, 1245." Br. in Opp. 8. The petition conveys no "implication" concerning this matter, because it is of no relevance to the issues before this Court. In any event, Judge Weigel did not explain his recusal as does respondent. See App., *infra*, 2a-4a.

Second, respondent states that the petition "implies incorrectly that the FBI agents made Judge Aguilar aware that a grand jury was meeting prior to eliciting the false statements." Br. in Opp. 10. In the current posture of this case, respondent's suggestion is foreclosed. The trial court instructed the jury, in connection with the Section 1503 count on which respondent was convicted, that:

> [A] grand jury proceeding is a judicial proceeding. You should first determine whether one existed at or about [June 22, 1988]. You should then determine whether or not the defendant knew of it according to the standard that I mentioned [earlier in the instructions], that he had knowledge that it was ongoing and kn[e]w about it.

10 Tr. 1532.[6] By convicting respondent, the jury therefore necessarily found that respondent knew of the ongoing grand jury investigation. There was ample support in the record for that finding, including the tape of respondent's June 22 conversation with the FBI agents, see Pet. 8, and Solomon's previous conversation with respondent, see p. 4, *supra*.

---

[6] The court's reference to "the standard that I mentioned" referred back to the court's earlier general instruction that proof of a violation of Section 1503 requires "proof [that] must satisfy you *beyond a reasonable doubt unanimously* * * * that there was a pending judicial proceeding known to the defendant." 10 Tr. 1515 (emphasis added).

* * * * *

For the foregoing reasons, as well as those stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

OCTOBER 1994

APPENDIX A

18 U.S.C. 1512(b) provides:

Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay or prevent the com-munication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal

offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. Cr 89-0365 LCB

UNITED STATES

v.

ROBERT P. AGUILAR

Transcript of Proceedings

August 14, 1990

Volume 9

[1245] The Court: What are the grounds upon which you believe you should have to disqualify yourself?

The Witness: Thank you, your honor. I felt I did disqualify myself and I did so for this reason:

If I denied Tham's motion for reconsideration, which it was my intention to do, but if I had done that his lawyers could have claimed I was influenced by the FBI and their investigation.

On the other hand, if I granted his motion, which I would not have done, but had I done so, the claim could have been made that I was influenced by Judge Aguilar, which I was not.

And, Your Honor, if I may, I'd like to describe to the jury how these cases arise in our court, may I do that?

The Court: Briefly.

The Witness: In our court when a case is filed, whether it's a criminal case or a civil case, there's a lottery by computer, it's assigned at the filing to one judge. If it's a case assigned to me the case will bear a number and my initials following the case.

[1246] Then the case is then that judge's for all time, for all purposes. But if, for example, the case involves something in which a judge, I or another judge who gets the case, has stock in the corporation, he disqualifies himself because it would be unfair for him to hear that case.

So for the reasons I've already indicated I disqualified myself from the Tham case and the result of that was that it goes back into the lottery and another judge's name is drawn and the judge hears the rest of the case and that's the way it works.

Q. (By Mr. Meltzer) Had Judge Aguilar done anything to you to cause you to disqualify yourself in the Tham matter, sir?

A. You mean, before I disqualified myself?

Q. Yes, sir.

A. No.

Q. And at any time did Judge Aguilar attempt to improperly influence your decision in the Tham 2255?

A. Well, not directly to me.

No. 94-270

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT P. AGUILAR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: AUGUST 11, 1994
CERTIORARI GRANTED: NOVEMBER 28, 1994

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* The opinions of the *en banc* court of appeals and of the panel of the court of appeals are printed in the appendix to the petition for a writ of certiorari and have not been reproduced here.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-10597

UNITED STATES OF AMERICA

v.

ROBERT P. AGUILAR

RELEVANT DOCKET ENTRIES

Date	Proceedings
12/12/94	Argued and submitted to Proctor R. Hug, Cynthia H. Hall & Diarmuid F. O'Scannlain.
5/12/93	Filed Opinion: Affirmed in part, reversed in part, vacated in part and remanded (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. Proctor R. Hug, dissenting; Cynthia H. Hall, author; Diarmuid F. O'Scannlain, concurring.) Filed and entered judgment.
5/20/93	Filed order (Proctor R. Hug, Cynthia H. Hall, Diarmuid F. O'Scannlain): A sua sponte request for an en banc vote having been made, the parties shall file simultaneous briefs setting forth their respective positions on whether this case should be reheard en banc. The briefs shall not exceed 15 pgs. Forty copies shall be filed with the Court in S.F. within 21 days of the date of this order.

8/9/93	Filed order and amended opinion (Judges Proctor R. Hug, dissenting, Cynthia H. Hall, author, Diarmuid F. O'Scannlain, concurring).
9/2/93	Filed order (J. C. Wallace): Upon the vote of a majority of nonrecused regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3.
9/17/93	Filed order (J. C. Wallace): . . . Within 14 days from the date of this order, the parties are directed to file brief, not to exceed 15 pgs., on the question of the applicability of the wiretap statute to the facts of this case, concentrating on whether the statu[te] criminalizes disclosure of an expired wiretap authorization.
11/18/93	Argued and submitted to J. C. Wallace, Proctor R. Hug, Thomas Tang, Jerome Farris, Harry Pregerson, William A. Norris, Stephen R. Reinhardt, Melvin Brunetti, Alex Kozinski, Edward Leavy, Ferdinand F. Fernandez.
12/10/93	Filed order (J. C. Wallace, Proctor R. Hug, Thomas Tang, Jerome Farris, Harry Pregerson, William A. Norris, Stephen R. Reinhardt, Melvin Brunetti, Alex Kozinski, Edward Leavy, Ferdinand F. Fernandez): The panel opinion in this case, filed May 12, 1993, amended on Aug. 09, 1993, and reported at 994 F.2d 609, is withdrawn.
4/19/94	Filed opinion: Reversed (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Heard en banc; J. C. Wallace, dissenting; Proctor R. Hug, author; Thomas Tang: Jerome Farris; Harry Pregerson; William A. Norris; Stephen R. Reinhardt; Melvin Brunetti; Alex Kozinski; Edward Leavy; Ferdinand F. Fernandez, dissenting.)

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

No. CR-89-00365-01

UNITED STATES OF AMERICA

v.

ROBERT P. AGUILAR

RELEVANT DOCKET ENTRIES

Date	No.	Proceedings
06/13/89	1	Filed indictment.
02/08/09	256	Trial begins – jury (Counts 1-8).
03/19/90	303	Trial ends – jury (Counts 1-8).
		Jury verdict of not guilty (Count 3).
		Order mistrial declared (Counts 1-2, 4-8).
05/01/90	332	Government's Motion to Dismiss Counts II and V.
08/06/90	438	Trial begins – jury (Counts 1, 4, 6, 7-8).
08/22/90	461	Jury verdict of guilty (Counts 6, 8).
	461	Jury verdict of not guilty (Counts 1, 4, 7).
11/21/90	489	Filed notice of appeal (Counts 6, 8) (Appl #3) (Appeal from the final judgment entered on 11/15/90, sentence and order denying deft's motion for a new trial or, in the alternative, motion for judgment of acquittal both entered on 11/1/90, and all motions made by deft's counsel and denied prior to and during trial).

12/31/90 494	Filed notice of appeal (Counts 6, 8) (Appl #4) (United States Appeal pursuant to 18:3742(b) from the district court order imposed on 11/1/90).

The following is a substantially verbatim transcript of a portion of a consensually recorded conversation which occurred on May 17, 1988, beginning at approximately noon, in San Jose, California.

• • •

EDWARD SOLOMON:	What do you say Bob. How's everything going?
ROBERT AGUILAR:	Well too much work and not enough pay. (UI).

• • •

SOLOMON:	Anyway I umm, you know, the reason I called you, okay? You know, I called you.
AGUILAR:	You what?
SOLOMON:	I called you to meet you here, okay?
AGUILAR:	Uh hum.
SOLOMON:	Because, well, things have been happening and I don't know what the hell's goin' on. Ah I had a . . .
AGUILAR:	Let me tell you . . . let me tell you this and then you can go on from there.
WAITER:	Yes?
AGUILAR:	Yes I'm waitin' for you to say something.
WAITER:	(laughs) Oh I thought you . . . you said you were gonna tell me something.
AGUILAR:	You were gettin' prepared to make a speech so I though I'd listen to you.

WAITER: Okay I'll make a speech of the specials. Today's specials we have a sauted red snapper almondine. We have a roast leg of lamb in a rosemary sauce. We have a king salmon croissant served with a bernaise sauce, avocado, and jack cheese.

AGUILAR: I'd like the roast leg of lamb.

WAITER: Lamb? Leg of lamb?

SOLOMON: Well just give me the um.

[2]

AGUILAR: They have a good salad there.

SOLOMON: Well . . .

AGUILAR: A spinach salad with breast of chicken.

WAITER: Excellent.

AGUILAR: That's ah okay fine. And I'll have a cup of decaf when you ah bring it here? Okay?

SOLOMON: Now, here ya go.

WAITER: Now you have a choice. New potatoes, white rice, fettuccine Alfredo.

AGUILAR: Fettuccine Alfredo.

WAITER: Okay. And choice of soup or salad?

AGUILAR: What's your soup?

WAITER: Garden vegetable beef.

AGUILAR: Ah let me have the salad please. House dressing. I think I told you the story that . . . that Abe came to visit me.

SOLOMON: Yeah.

AGUILAR: And the F.B.I. took pictures and they came to see me?

SOLOMON: They come to see you?

AGUILAR: Yeah oh yeah they came . . . showed me the pictures.

SOLOMON: Oh I didn't know they came to see you because I heard this from somebody else.

AGUILAR: No they came to . . .

SOLOMON: Then I'm next.

AGUILAR: . . . they came to see me and ah they asked me if I knew Abraham ah. (UI) what's his?

SOLOMON: Chapman.

[3]

AGUILAR: Chapman. Well I said no. I don't know anybody by that name. He said well he's been visiting . . . he's visited you at your house. I said, that's Abraham, I said oh Abie. I said I didn't even know his last name. And I told 'em yeah he's the . . . he's the father-in-law . . . former father-in-law of one of my brothers. Family. They asked me if I had if I had intervened with any judge on his case. No I've never intervened in his case at all. But I also knew they were wire tapping him. One day I was in San Francisco and I had lunch with Peckham and he arrived fifteen minutes late. And he says oh shit he said the F.B.I.'s up there getting (UI) getting a ah ah wire tap order on Abie the killer. I said Abie the killer. (laughs).

SOLOMON: Abie the killer. (laughs)

AGUILAR: Yes he says he's the last living member of Murder Incorporated. I said what? But anyway go ahead. Now that's all I wanna tell you. But they did they went out there and I saw them and I knew that and I told him.

SOLOMON: I know. You told me ah when you called. Remember, I called you? Ah okay. We had an investigator . . . an ex-F.B.I. guy on this new case here . . .

AGUILAR: Uh huh.

SOLOMON: . . . and he gave me ah . . . he didn't call me he came to see because ah, you know, my phones might be tapped.

AGUILAR: Uh hum.

SOLOMON: And he came to see me and he related that from his sources, you know, his old connections that ah . . .

AGUILAR: Uh hum.

SOLOMON: . . . that ah ah I guess somehow they knew he was on . . . did some work on the case and that . . . that ah, you know, he Abe, you know, Abe and that incident with you and Abe and that they . . .

AGUILAR: They connected that?

[4]

SOLOMON: . . . they talked . . . they talked . . . they talked to . . . they talked to you and, you know, and he says watch out I'm . . . he thinks I'm next. Okay?

AGUILAR: This F.B.I. guy, is he the guy who's working on this case?

SOLOMON: Well he . . . he worked on the case. He's he's not . . . he's an ex.

AGUILAR: Mmm. Okay.

SOLOMON: You know?

AGUILAR: Well the reason why they tied me into Abe is because they were following Abe and they caught him in my house. But that's only in connection with his case.

SOLOMON: Yeah well I . . .

AGUILAR: They never asked me anything about . . .

SOLOMON: Um I've been told that I'm next. Okay? I . . . I . . .

AGUILAR: Well do you represent him in any way?

SOLOMON: No. I only one that I represent is . . . and he hangs out there day and night.

AGUILAR: Yes.

SOLOMON: Okay?

AGUILAR: But he . . . he's . . . you mean he's over at that guy's place all the time?

SOLOMON: Oh every minute.

AGUILAR: Well what's the story? Why is he there all the time?

SOLOMON: I, I, I, I don't know. I don't even go over there, you know? I told you I got pushed into this thing . . .

AGUILAR: They never asked me about you. They never mentioned anything about you at all.

[5]

SOLOMON: Okay. They never mentioned me in any way?

AGUILAR: They never mentioned anything about Tham at all.

SOLOMON: Okay.

AGUILAR: No. Rudy Tham.

SOLOMON: Okay. The only thing is that he, you know, what he says . . . he explained to me is they know Abe is with Rudy, you know, Abe comes to see you. I'm on the case with Rudy and now, you know, the guy . . .

AGUILAR: What did he say about why Rudy comes to see me?

SOLOMON: Rudy? Not Rudy?

AGUILAR: I mean why Abe comes to see me?

SOLOMON: I . . . I really don't know but they (UI).

AGUILAR: All right here's what I told 'em and it's true. The time they saw him he came over and gave me some figadatis that his wife had cooked.

SOLOMON: What's a figadati?

AGUILAR: They're . . . they're Italian cookies. Fig cookies.

SOLOMON: Oh okay okay okay.

AGUILAR: She gives 'em to me every year.

SOLOMON: Hmm hmm.

AGUILAR: The other time he came to see me . . . which they may have followed him . . . he came to bring me some Italian sausage which his wife always sends to me. And that's the whole (UI) I says he's only in there about ten minutes. I says he comes in leaves the stuff off and I . . . I pour him a glass of brandy . . .

SOLOMON: Uh hum.

AGUILAR: . . . and he leaves.

[6]

SOLOMON: Right. The the

AGUILAR: They . . . they know he's only in there ten minutes.

SOLOMON: Okay the only thing is, you know, I don't know your relationship, you know, with Abe, you know, other than he's . . . was ah your sister's . . . your brother's ah whatever . . .

AGUILAR: He's my brother's former father-in-law.

SOLOMON: Father . . .

AGUILAR: But I've only seen the man six or seven times in my life.

SOLOMON: Yeah. Yeah but I don't . . . I don't know, you know, with ah . . . ah . . .

WAITER: Would you like pepper?

AGUILAR: Yeah aaa,

SOLOMON: . . . 'cause, you know. I'm ah . . . Bobby, you know, I'm worried. You know, ah I don't want ah . . . but, you know, that's why I'm ah here. And he told, you know, they told me ah that ah . . . the guy told me he says, you know, they're coming to you next and ah, you know, and ah and, you know, the . . . the question is ah why ah Weigel, ah you know, got out of the case? And I don't know, you know?

AGUILAR: I don't know.

SOLOMON: Huh?

AGUILAR: I certainly don't know. He just got lazy I think.

SOLOMON: Well yeah I don't know. You, you know, because ah . . .

AGUILAR: Why don't they ask Weigel? (laughs)

SOLOMON: The only thing is, you know . . .

AGUILAR: And if they came to ask me I'd tell 'em to go fuck themselves.

[7]

SOLOMON: Well the only problem is . . . I . . . I know . . . I know you made some inquiries you know, on behalf to find out where it's at . . .

AGUILAR: (UI). Yeah I . . . I did more than that.

SOLOMON: Huh?

AGUILAR: I did more than that.

SOLOMON: Well I . . . I don't know what you did, you know, but I'm ah concerned . . .

AGUILAR: What I did I did on my own. It had nothing to do with you.

SOLOMON: Okay because I'm I don't know what you did with 'em ah but all of a sudden the guy, you know, ah disqualifies himself and then . . .

AGUILAR: I don't think it had anything to do with it.

SOLOMON: Well . . .

AGUILAR: I think he just didn't want to be bothered with it.

SOLOMON: Because I'm, you know, I'm concerned, you know, when they come what the fuck do I tell them?

AGUILAR: Do what?

SOLOMON: What the hell do I tell them?

AGUILAR: What do you tell 'em, what're they gonna ask you?

SOLOMON: Well I don't know. If they ask me, you know, our relationship or whatever?

AGUILAR: Oh. You and I went to law school together. We didn't . . . I had nothing to do with you regarding this case. Nothing.

SOLOMON: Well the only problem is ah ah I . . . my fear is, you know, Linda doesn't work for me anymore, you know, but . . .

AGUILAR: Who doesn't work for you?

SOLOMON: Linda. You know?

[8]

AGUILAR: Who's Linda, oh that gal yeah.

SOLOMON: Yeah. You know, she saw you and you gave us procedure, you know, things to . . . how to put procedure-wise, you know?

AGUILAR: Uh hum.

SOLOMON: Yeah you also gave us the ah what do you call . . . the instructions for my ah wrongful discharge. But that's what I'm afraid, you know, they're gonna ask me what's my connections with you . . .

AGUILAR: Why would they ask you anything about me?

SOLOMON: Well the . . . the guy told me what they're . . . they're lookin' into, okay, that they think ah . . .

AGUILAR: There's a connection?

SOLOMON: . . . there's some connection they think with . . . there's some connection why Weigel . . . because, you know, maybe because Abie's always there with ah with Rudy ah I don't know. But he um they see one another regularly, you know? And that's my problem. I'm, you know, I'm scared shitless.

AGUILAR: I don't think . . . why would you be scared, 'cause they're gonna tie you in with me?

SOLOMON: Right. Well whatever they tie in, you know, ah, you know, who wants to be on the ah F.B.I. hit list? I don't wanna be on it.

AGUILAR: You're not gonna be on their hit list. They may wanna know what you know about Abie . . . Just say hey I don't (UI). He's never been a client of yours has he?

SOLOMON: Oh no. No I don't even talk to the guy half of the time. Yeah but ah . . .

AGUILAR: They never asked me anything about Tham.

SOLOMON: Well my information okay . . .

AGUILAR: They never asked me anything about you. [9]

SOLOMON: Okay. My information is from a, you know, a very good source.

AGUILAR: (UI).

SOLOMON: And I think you know . . . you know the guy that did some work for us on the case.

AGUILAR: Bates?

SOLOMON: Yeah.

AGUILAR: Yeah but he's on the outside now.

SOLOMON: Well I understand that.

AGUILAR: But they . . . they . . .

SOLOMON: But, you know . . .

AGUILAR: . . . they were concerned about why he was there to see me and did I intervene in any case . . . I didn't even know he was under indictment.

SOLOMON: He's under indictment.

AGUILAR: I never knew that.

SOLOMON: Well that . . . that's the ah one that ah Allan Dorfman, you know, got shot? Him and ah him and this other guy . . . what the hell's his name . . . from ah Chicago ah Schwartz are supposed to go on trial. I . . . I don't know when but ah that's my understanding.

AGUILAR: He told me . . . they told me he was gonna go on trial in June or July.

SOLOMON: Yeah that's what I heard. He's gonna go on trial shortly.

AGUILAR: The F.B.I. told me. I said look . . . I . . . I'm shocked. This is the first time I've heard about this. He never mentioned this to me. (UI) and I said I'll tell you why he comes to me. He's a family friend. He brings me these . . . As a matter of fact I says if you were watchin' him you'd see he brought in a little box. The other time he brought in a little package . . . meat package. He had the . . . the um sausage. He says well why does he [10] bring it to you and I says his wife and I have been friends all my life.

SOLOMON: Mmm.

AGUILAR: Very good friends Josie Knaack. As a matter of fact I went to visit her when she was injured. 'Cause I was at my mother's home and my mother said I should go see her so I went to see her. I visited for about an hour and as I was gonna go out the door Abie

came out and that's the first time I've ever seen the man. I've never seen him before that. No I did. I saw him at . . . at the wedding of ah . . .

SOLOMON: Your brother.

AGUILAR: No ah no my brother's son. No no. When my brother married it was long before he was into the picture. My brother married . . .

SOLOMON: Oh. You said stepdaughter?

AGUILAR: Yeah uh hum.

SOLOMON: I don't I don't know, you know, I don't know Abe. I don't know who ah . . . I know him but I don't know who he's married to or who his daughters are or whatever.

AGUILAR: He's married to Josie Knaack. As a matter of fact that's what I call her, Mrs. Knaack. We all call her that.

SOLOMON: Mmm.

AGUILAR: She's mar . . . I don't even know, if she's married to this guy. If she is married to him I've never known the name. I didn't know his last . . . his last name was . . . I keep on wantin' to call him Joffe. Abe Joffe.

SOLOMON: Abe Joffe went to school with us. (laughs)

AGUILAR: Chapman that's his name. Joffee went to school with us.

SOLOMON: (laughs)

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[11]

AGUILAR: . . . I would not Ed, I would not be worried. As you are.

SOLOMON: Yeah well I am, you know . . .

AGUILAR: In the first place you shouldn't be worried. What . . . first you've done nothing wrong. All they wanna do is . . . is find out what you know about Abe.

SOLOMON: Well it . . . it goes deeper than that according to my source, okay? I mean uh our relationship I mean. Between you me and ah . . .

AGUILAR: Between me and you?

SOLOMON: . . . you, Abe, Weigel . . .

AGUILAR: Well then why in the hell (UI) . . .

SOLOMON: Eh?

AGUILAR: (UI)?

SOLOMON: I don't know. No I never . . . I never had ah . . . (laughs) . . . I never been, you know, on their hit list. The F.B.I. All they used to do is serve me for the papers with the Teamsters but that ah that's neither here nor there. The . . . the guy, you know, the guy's pretty knowledgeable that gave me the information. If it came off . . . if it came off of some other guy, you know, ah 'cause ah, you . . . you know, I . . . I got out of there's some other shit they just got into ah Abe, Rudy . . .

AGUILAR: What the hell'd they do?

SOLOMON: Well I really don't know. It's somethin' with pallets.

AGUILAR: Pallets?

SOLOMON: Yeah. Ah with L.A. and um . . .

AGUILAR: Stolen pallets or something?

SOLOMON: I don't really know. They didn't tell me. I was representing these two guys from L.A. before the Grand Jury. I thought they were gonna get a walk, you know the

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AGUILAR: Uh hum. Yeah.

SOLOMON: . . . they just go in there I get them immunity or, you know, ah . . .

AGUILAR: Uh hum.

SOLOMON: . . . and they weren't the targe' but instead they start tellin' me they are the targets ah one of them especially and that ah, you know, and ah the names of ah Abe and Rudy and ah . . .

AGUILAR: Jesus Christ!

SOLOMON: . . . another guy ah the ex-Mayor's brother-in-law and some other guy down in L.A. You know, I don't know what that investiga . . . I really didn't get into it. Some sort of ah fraud.

AGUILAR: What do these guys doin' for Christ's sake?

SOLOMON: I, you know, I don't know what they do. They're . . . they're . . .they're the over the hill gang.

AGUILAR: Yeah.

SOLOMON: They're the over the hill gang and ah and and . . .

AGUILAR: And they gotta keep gettin' involved in crime d'you mean?

SOLOMON: And they gotta keep gettin' involved in all sorts of crap. I don't . . . I don't really know. All I know is, you know, I'm pissed at him ah for gettin' me even on the . . . the list ah that Rudy. You know, he never stops. You know, he always ah, you know, he always says, you know, ta call . . . call you and call you and call you and ah . . .

AGUILAR: And he calls me and tells me to call you.

SOLOMON: Who?

AGUILAR: Ah Abe.

SOLOMON: Abe? Ah he called . . . well I . . . I, you know, I really don't know what Abe's relationship [13] with Rudy is except probably they're in on somethin' ah together.

AGUILAR: They're buddies.

SOLOMON: Yeah they're buddies but ah I don't know what he . . . what he, you know, what he tells Rudy, you know, your relationship or ah ah me ah, you know? But every time they tell me, you know, call you, you know, and then I call you and I . . .

AGUILAR: And I don't know anything.

SOLOMON: Yeah. Well, you know . . .

AGUILAR: Well I don't . . . I've not mentioned anything to them regarding Tham, Rudy, you. They never asked me.

SOLOMON: Yeah.

AGUILAR: And if they ask me, you and I are friends. We went to law school together. We have lunch every so often.

SOLOMON: The only problem, you know, I, you know, I have a feelin' that they've been watchin' Rudy. And ah that's . . .

AGUILAR: I told them that I have had conversations over the phone with Abe. But it was in connection with his finding work for one of my brothers. He got him a job or somethin' like that. I don't know. I told him to contact my brother and that's all. I have nothing . . . don't know what the hell kind of work he got him or anything.

SOLOMON: Well . . .

AGUILAR: As far as my talking with any judges intervening on behalf of Abe Chapman, no. Because I didn't even know he was under indictment.

SOLOMON: These guys'll use everybody.

AGUILAR: They use every trick. But they were . . . they were very satisfied. When I merely told who it was immediately they said oh oh that's fine and closed their book.

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SOLOMON: All right.

AGUILAR: And then as they were gonna leave and I said we just sat and chatted with 'em. They got what they wanted to know why he was there and what he'd brought to me. I told 'em what he'd brought to me.

SOLOMON: What the hell'd he bring you . . . ah cookies.

AGUILAR: Yeah he brought me the cookies.

SOLOMON: Huh. That's something.

AGUILAR: I said I don't have anymore cookies but I still have the box.

SOLOMON: Yeah.

AGUILAR: It's a clear plastic container. I says his wife gives me a bottle of booze and the cookies every year. This year I only got the cookies. I'm falling into disfavor, you see?

SOLOMON: Yeah. Well the only, you know, my . . . my problem is, you know, you . . . you said thay had Abe ah tap . . . ah?

AGUILAR: Had him what?

SOLOMON: Tapped, you know.

AGUILAR: Tapped?

SOLOMON: Yeah, his phones?

AGUILAR: Oh yes. Oh yeah the phone's definitely tapped.

SOLOMON: Huh?

AGUILAR: Absolutely.

SOLOMON: Yeah I didn't know what, you know, between him and . . .

AGUILAR: His home.

SOLOMON: . . . yeah well I don't know between what he said to Rudy . . .

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AGUILAR: But see I told him this the next day. I didn't tell him . . . I told . . . I told my nephew and I said I want you to tell him not over the phone. You get to his house and tell him. He says I'm gonna go see him tonight. So he went and saw him that night and told him and then the next time I talked to Abe

he called me from a pay phone. He only calls me from pay phones.

SOLOMON: Well, you know?

AGUILAR: Then I told him . . .

SOLOMON: These guys never stay off the phone. They call me all hours of the . . . the night, you know?

AGUILAR: From . . . from their homes?

SOLOMON: From their home from their . . . their office ah, you know, that's what I'm worried about, you know, really that ah the shits gonna come on me, you know, we . . . we talked ah, you know, you told me a couple times that . . . that ah you know the guy's gonna treat me fair and then, you know, I think one time he said ah it . . . was it when you went to the football game or something ah, you know, you don't wanna go any further with the man, you know?

AGUILAR: I don't understand that.

SOLOMON: Well ah remember you told me that, you know, you al . . . you always have told me that Weigel would treat me fair but you couldn't guarantee anything.

AGUILAR: That's right. That's right.

SOLOMON: And then you said you I think one time I had a laugh you know.

AGUILAR: You had a what?

SOLOMON: I had a laugh. You told me he, you know, he forgot . . . he thought he decided the case or somethin'.

AGUILAR: Yeah. He told me.

SOLOMON: (laughs)

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AGUILAR: Forget it. Let . . . let me tell you this Ed . . .

SOLOMON: Go ahead.

AGUILAR: Weigel needed hotel reservations for ten and needed ten flights.

SOLOMON: To what?

AGUILAR: Cabo San Lucas. For Chris . . . right after Christmas.

SOLOMON: Oh.

AGUILAR: Week after Christmas.

SOLOMON: Did he go there?

AGUILAR: So he asked me if I could . . . if I knew any way that I could help him. So I sent him to the Mexican consul. The Mexican consul couldn't help him.

SOLOMON: He could?

AGUILAR: But then . . . pardon?

SOLOMON: He . . . he helped him?

AGUILAR: Couldn't help him. So then I called and found out that P.S.A. was putting on flights to Cabo San Lucas starting November of last year. So I called ah a friend of mine in San Diego who knows the executive president . . . executive vice-president of P.S.A.

SOLOMON: Yeah?

AGUILAR: I said I have got to have ten seats to Cabo San Lucas the week after Christmas. He says you got 'em. Then I got a hold of a

friend of mine who knows the guy that owns the ah Hotel Cabo San Lucas and La Hacienda.

WAITER: You never got your decaf?

SOLOMON: No it never came.

WAITER: Okay. A miscommunication here.

SOLOMON: That's all right.

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AGUILAR: Jesus Christ (UI) dinner.

SOLOMON: That's ah pretty ah rich, huh?

AGUILAR: That's too much.

WAITER: Would you like some Parmesan cheese on your pasta?

AGUILAR: Very very little. Very little. About a third of a spoon. That's good. And then so I got him ah I got him the ah reservations.

SOLOMON: Would you care for this egg? I don't eat eggs.

AGUILAR: Yeah (UI) eggs.

SOLOMON: Yeah I . . . I . . . I don't . . . I don't eat any more eggs because of ah cholesterol

AGUILAR: So he says to me you are a a real friend and I have asked you for help many many times and . . . and you've only asked me for help maybe once or twice and I'm gonna do everything to help you.

SOLOMON: Mmm.

AGUILAR: He never said any more than that.

SOLOMON: That . . . that's in ah . . . for our friend.

AGUILAR: Yeah.

SOLOMON: Mmm. Did they ever . . . did they . . . did they talk to him ah, do you know?

AGUILAR: I don't know. They never mentioned it to me. They never mentioned any judge and I would assume if they were really investigating that they'd say well have you ever talked to Judge Weigel? No I said that's him and is it ah . . .

SOLOMON: Is that Decaf?

WAITER: (UI). Decaf!

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AGUILAR: And then all they asked me is did you intervene in any . . . with any judge on this case?

SOLOMON: On Abe.

AGUILAR: I says I didn't even know Joffee Chapman.

SOLOMON: On Abe . . . on Joffee Jesus Christ (UI).

AGUILAR: And I didn't even . . . I says shit I didn't even know he was indicted. I says I don't even know what judge is handling it and they said Judge Orrick. I says I haven't talked to Judge Orrick about anything. And my conversations with Judge Orrick are good afternoon Judge oh good afternoon Judge and that's it. I says you can ask him that. And that's as far as they go. And they left.

SOLOMON: This is pretty good um good.

AGUILAR: Yes. They were worried that I being a friend of his would go talk to Orrick and get Orrick get information from Orrick or get Orrick to do something to help (UI).

SOLOMON: (UI).

AGUILAR: I said that's their concern. Nothing else.

SOLOMON: Well okay. May . . . maybe this guy's . . .

AGUILAR: No, I'm fully satisfied that . . .

SOLOMON: . . . he doesn't know what the hell I'm talkin', you know, maybe he's tryin' to scare me or something.

AGUILAR: Well yeah. (UI). There's nothing more than that as far as I'm concerned.

SOLOMON: Uh hum.

AGUILAR: And they were satisfied because . . . they don't have anything. That's all.

SOLOMON: Well you know . . .

AGUILAR: You see it's . . . it's . . . it's Abe they're after. And so they're tryin' to see who the hell is he tryin' to bribe or compromise.

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SOLOMON: Well I tell ya not only ah Abe ah but they're after Rudy and these other guys and . . . my problem is that, you know, I don't know why the guy would tell me this if it isn't gonna come down. You know. This is all my concern. If I come down, where the hell do I go?

AGUILAR: What . . . what . . . what the hell could come down on you?

SOLOMON: Hey ah, look at.

AGUILAR: Nothin'. You haven't done anything.

SOLOMON: Well, you know, when I talk to Rudy sometimes I, you know, I'm a lunatic . . .

AGUILAR: Well you talk to him, you're his lawyer. But you haven't bribed anybody. You haven't you haven't compromised anybody.

SOLOMON: Uh hum.

AGUILAR: You haven't done anything unlawful. You've talked to your client. You can talk to him, you can tell him whatever the hell you want. So I was trying to make him feel good so I told him I had it wired.

SOLOMON: 'Cause (UI) obviously about half of these guys need some sort of wiring because at with this other thing in Los Angeles where they had um . . .

AGUILAR: What?

SOLOMON: They had ah in Rudy's first case I was ah intercepted with Fratiano's phone calls. They served me ah, you know, a list.

AGUILAR: You mean they tapped your phone? Or his?

SOLOMON: Their phones calling me.

AGUILAR: Yeah. You should've never talked to him after that. 'Cause once I found out that they were tapping the guy's phone the first thing I ask him, where are you calling me from? The pay phone. See I can hear the traffic. It's okay. What do you want? I [20] wouldn't talk to him any other time. One time he called me I said where you calling me from? Marilyn's house. I said well I'm busy right now you'll have to call me some other time.

SOLOMON: But these guys, you know, I wanna tell you something they use people always, you know?

AGUILAR: Oh yeah. They never told me don't talk to him about this (UI) the chamber (UI).

SOLOMON: You know, they had me every two minutes ah, you know, calling down there to you and ah . . . remember when I called you in Denver and I said I said you want what do you want . . . do you want . . . they told me to call you and then you said well, I didn't want we ended up talkin' about your . . . your school.

AGUILAR: Yeah.

SOLOMON: Yeah.

AGUILAR: What the hell? I said why're you calling me? What the hell am I supposed to do?

SOLOMON: Do you think that Abe was telling ah Rudy somethin' . . .

AGUILAR: Well what the hell do they want that I could pay money to Weigel or something?

SOLOMON: Who knows?

AGUILAR: I'd never consider that.

SOLOMON: No. You know, Abe is a bullshit artist.

AGUILAR: He's from the old school, you know, they give a guy . . .

SOLOMON: He's a great con man.

AGUILAR: . . . ten bucks and . . . and you're gonna do somethin' you want? Bullshit. (UI) don't do that. I don't.

SOLOMON: Well, you know, all . . . all, you know, I can do is . . .

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AGUILAR: In other words if I talked to a judge all I'd say is be fair to this guy. That's all. Be fair to him. I don't see anything wrong with that. It . . . it's no different from writing a letter of recommendation for a guy.

SOLOMON: That . . . that Weigel I don't know . . . I guess you have a good relationship with him. But, you know, I . . . that guy . . . that guy, you know, is the most rudest guy in the world, you know?

AGUILAR: I understand that.

SOLOMON: Oh man. But, you know, and I think . . . I think he's somewhat . . . excuse the expression . . . senile.

AGUILAR: Uh huh. I think he's gettin' there fast.

SOLOMON: You know, ah, you know, I don't know you . . . you'd probably have to tell him more than once to be fair. I don't think he ev . . . you know, when you tell me he forgot that he . . . that he decide . . .

AGUILAR: Well when he told me he thought he ruled on it.

SOLOMON: Yeah.

AGUILAR: Well that's not unusual. You know . . .

SOLOMON: No.

AGUILAR: That's because I have a lot of cases in my courtroom and shit guys asked me things (UI).

SOLOMON: Yeah but this case I mean, you know, he ah, you know, this is ah . . .

AGUILAR: A cause celebre.

SOLOMON: . . . this is a publicity case, you know?

AGUILAR: Yeah.

SOLOMON: And . . .

AGUILAR: Funny he wouldn't remember that one.

SOLOMON: This is one, you know, it's, not the guy who comes off the street and he's a dope dealer [22] or somethin' they send him away. This is a case, you know, involvin' ah prominent San Francisco guy and they just held him in contempt for Christ sake.

AGUILAR: Now Rudy Tham, is he Jewish?

SOLOMON: No. (UI). No. Rudy Tham is Yugo . . . Yugoslavian. His name is Antonovich. Okay? That was his father who lived in New Jersey . . . left the mother I guess, you know, early in life and ah he . . . he met 'em . . . he met 'em about two times after . . . when he was dyin', you know? Tham is a German or a Dutch name and that was his grandparents?

[* * side B * *]

AGUILAR: He took his grandparents' name?

SOLOMON: Yeah his mother's.

AGUILAR: On his mother's side?

SOLOMON: Yeah. Yeah. The only thing with him he's the guy that ah you can't get two cents out of, you know, every all the bullshit . . . they all bullshit you.

AGUILAR: You mean he doesn't pay you?

SOLOMON: I haven't got paid a penny on this. It cost me about five . . . six hundred bucks. It was a friendship (UI) you know.

AGUILAR: Well what the hell . . .

SOLOMON: I . . . I hadda pay Linda sometimes . . .

AGUILAR: Linda wrote a damn good brief.

SOLOMON: Oh yeah she, you know . . .

AGUILAR: What happened to that girl?

SOLOMON: Well.

AGUILAR: Where'd she go?

SOLOMON: She hocked me too much for the money and this and that, you know, she'd bust my ass, you know.

AGUILAR: Good-lookin' gal.
[23]

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AGUILAR: (laughs). Yeah.

SOLOMON: Terrible. I mean Jesus she can . . . she can drive you crazy but she did some nice work and when I did that other thing she was taken up with that other case ah remember the . . . what was that?

AGUILAR: Wrongful discharge.

SOLOMON: Wrongful discharge you gave me the instructions? And I had this other kid . . . I can't remember his name . . . Italian kid from Denver do the ah petition for reconsideration ah when he, when he put him he was in jail . . . when they (UI) . . .

AGUILAR: Yeah.

SOLOMON: So . . .

AGUILAR: If they ever ask me what contact I had with you I'll say yeah you asked me over the

years you've asked me questions. Other lawyers do. You asked me something about wrongful discharge. You didn't even give me the name of the people. Cause it wasn't my case. As a matter of fact I don't remember now whether it was a state court case or a federal case but we did discuss wrongful discharge. I'm not gonna tell 'em anything if I have to tell 'em anything that's what I'll tell 'em.

SOLOMON: Yeah. Well I . . . I just . . . I just pray that ah, you know my feel . . .

AGUILAR: I don't think you should be so worried.

SOLOMON: My . . . well . . .

AGUILAR: I don't really think that they're gonna come to that.

SOLOMON: My . . . my feelings are, you know, because this guy said they're gonna go to me and then ah they went to Mister Weigel and ah . . .

AGUILAR: Don't worry about it, okay?

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SOLOMON: Ah then they . . .

AGUILAR: I wouldn't worry about it.

SOLOMON: . . . then they're gonna, you know, me. And then ah . . .

AGUILAR: What is Weigel gonna tell 'em? Yes Aguilar came and offered me a bribe? Or Aguilar came and asked me to do something? Weigel would never say that.

SOLOMON: Well . . .

AGUILAR: We're not even supposed to listen to something like that. No. Weigel is not

gonna say anything. Weigel likes me. Weigel would not do anything that would in any way injure me.

SOLOMON: How . . . how'd he get to like you for Christ's sake? This guy hates everybody in there for cryin' out loud.

AGUILAR: Weigel liked me from the very beginning. And I'll tell you a story. When I first came on this court in 1980, the White House called me three times while I was in the dining room. Three different occasions. And each time it was to invite me to Washington D.C. to have dinner with the President.

SOLOMON: Did you?

AGUILAR: Weigel got me . . . yes and I went. Weigel got the message. He answers the phone in the dining room. Nobody else.

SOLOMON: Well you mean in the judges . . .

AGUILAR: Judges' dining room.

SOLOMON: I thought you had a dining room at house . . . in the house. I thought what the hell does he answer your phone for?

AGUILAR: But . . . but it's . . . only he answers that phone. Each time he says it's the White House for you. So he came up to my chambers and wanted to know what it was and says I know you're gonna be Attorney General. No. He says you're gonna go to the you're gonna go to the [25] Supreme Court. I says Stanley come on. He says now look I know you won't tell me but if you're gonna be Attorney General he says I wanna be your Deputy Attorney General and you gotta remember me.

SOLOMON: (laughs)

AGUILAR: Now ser . . . seriously. He was serious about this . . .

SOLOMON: Yeah? (laughs)

AGUILAR: Oh yeah he'd come to see me daily.

SOLOMON: Hey . . . hey wait a minute Bobby. That was ah eight years ago he was only seventy-two then ah . . .

AGUILAR: I know. We had been . . . because of that we've become real friends. Then when I got him these airline tickets and I got him the reservations out there it it was impossible. He called all kinds of people and he couldn't get anywhere.

SOLOMON: Mmm.

AGUILAR: And I did it for him. He just thinks it's . . . God he says you . . .

SOLOMON: He travels that far?

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AGUILAR: In 1982 he went to Mexico . . . to Mazatlan and he asked me about Mazatlan. Where he should stay and ah where the best places to go and he says where are the cleanest and safest places to go?

WAITER: Can I take your plate?

SOLOMON: Yeah. Very good. Here.

WAITER: How was the lamb?

AGUILAR: It was good thank you.

WAITER: Good.

AGUILAR: Thank you.

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SOLOMON: And I'll have a little more decaf if you have it.

WAITER: A little more decaf?

SOLOMON: Yeah.

AGUILAR: You can . . . noth . . . nothing more for me. If you're gonna . . . if you're gonna go . . . do you have any vanilla ice cream?

WAITER: We sure do.

AGUILAR: One little scoop. One scoop of vanilla.

SOLOMON: Come on will ya for Christ sake? Have . . . have mercy on your body.

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SOLOMON: Does he . . . is he he doesn't have a wife.

AGUILAR: He has a wife yeah. She's always sick and she never travels with him.

SOLOMON: Oh my God!

AGUILAR: The only time she travels with him is when the family goes. That's why he needed ten tickets 'cause he has two daughters and they have a son-in-law . . .

SOLOMON: I don't I really don't know too much about the guy except, you know, with my encounter with him ah, you know, ah that was . . .

AGUILAR: No he likes me.

SOLOMON: That was enough . . . that was enough, you know, Jesus Christ I . . . I thought that I was gonna get murdered ah all my encounters with him, you know, ah the man just ah gets on everybody's case. I don't know why but ah . . .

AGUILAR: You know, I tried a . . . two cases before him when I was a lawyer. He never chewed me out. Never said anything bad to me but he chewed the other guys out.

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SOLOMON: I . . . I didn't even open my mouth. I said, you know, this is what ah we can show and he says . . . (laughs) . . . shut up.

AGUILAR: He says that, shut up? No he never . . . nev . . . I never had . . . I've never had trouble with any judge.

SOLOMON: (UI) shut up that's all hearsay and let Mister Beeson talk. So I shut up. You know? I didn't know whether he wanted me to get shot and then the next time we went there the . . . he teared . . . teared the head off of that kid ah Rappaport.

AGUILAR: (UI).

SOLOMON: I was off the hit parade but I guess he takes turns, you know, I watched him in his ah in his pre-trials and so forth . . . well you must know who he ah has that mannerism.

AGUILAR: Oh yeah.

SOLOMON: Uh you know, but what ah what can I tell you, you know, ah when he's up there he's the king.

AGUILAR: God I hope I never get that reputation.

SOLOMON: Well . . .

AGUILAR: But of course I don't do that.

SOLOMON: Well, you know, you know, ah the . . . the . . . the thing is . . . well, you know, some of them guys, you know, umm . . .

AGUILAR: Sam Conti's that way.

SOLOMON: Well . . .

AGUILAR: Vukasin's that way.

SOLOMON: . . . well I don't know but . . .

AGUILAR: Have you appeared before Vukasin in this case yet?

SOLOMON: No. No no.

AGUILAR: He hasn't set it for hearing?

[28]

SOLOMON: No he hasn't. They're supposed to ah I talked to his clerk and she's supposed to ah give me . . . he's gonna . . . he's gonna rule on it right from the . . .

AGUILAR: Then, he's gonna take it under submission on the papers?

SOLOMON: Right.

AGUILAR: No hearing (UI).

SOLOMON: Well and that's . . .

AGUILAR: That's . . . that's typical of him. He's not gonna give you a hearing.

SOLOMON: Well I . . . I don't know about that, you know, I . . . I'm not gonna argue with him. Ah I'm sort of ah relieved I don't have to go before him. But ah I I never been went before him. The only . . . the only one that went before him was Linda on another wrongful discharge and I think it was with P.G. and E.

AGUILAR: Uh huh.

SOLOMON: And the . . . and the union and ah he dismissed that one ah . . .

AGUILAR: No he likes P.G. and E., you know?

SOLOMON: He said . . . he said . . . he said . . . he said that the guy was a really a gentlemen with her. Ah real nice and um . . .

AGUILAR: But he threw her case out.

SOLOMON: Yeah well yeah, what am I gonna tell ya, you know, I don't know the man, uh you know, um Conti ah I . . . I've been before him a couple of times but not that extensive and, you know, he's not rude he don't . . . he gets heavy on your client. But ah Orrick he . . . he, you know, he doesn't say too much and Schnacke don't say too much but ah, you know, the . . . the . . . you know, they're heavy on criminal cases.

AGUILAR: Heavy sentencers.

[29]

SOLOMON: Yeah.

AGUILAR: You can't . . . you can't fault a judge for being heavy on criminal cases.

SOLOMON: Oh no I'm not . . . I'm not telling you that.

AGUILAR: Because I mean there's guys that are . . . are . . . are light like me.

SOLOMON: Yeah.

AGUILAR: And there're guys that're heavy like Conti and shit that . . . that's the way they are. What're you gonna do?

SOLOMON: I . . . well you can't . . . you can't do nothing.

AGUILAR: As long as they're not rude to you. (UI).

SOLOMON: That's right. Hey I have no . . . I have no problems with the judge providing, you know, he treats you like a human and ah . . .

AGUILAR: That's right.

SOLOMON: That's . . . that's all. I don't . . . I don't ask him to ah, you know, ah . . .

AGUILAR: I've never complained about a judge who sentenced a client of mine heavily. 'Cause I figure, you know, he's . . . he's doin' it within the guidelines and as along as he does that's his judgment.

SOLOMON: Oh yeah. You . . . you know?

AGUILAR: I've never, you know, my clients have bitched and everything. I said, hey, you know, he's got a right to do that.

SOLOMON: That's right.

AGUILAR: As long as he doesn't . . .

SOLOMON: Overdo it . . .

AGUILAR: You know, I mean that's total way way out of line. But in twenty years I only had five guys sent to prison. All the others were county jail time or probation.

[30]

SOLOMON: Well . . . hey that's good. You know? I had more than that.

AGUILAR: And I had a hell of a lot of . . . I had a big criminal trial. (UI).

SOLOMON: Yeah well your brother did . . . did a lot of property and divorce with you.

AGUILAR: That's what I did.

SOLOMON: Well you on . . . you were on with Jesse.

AGUILAR: No. I did . . . I did probably forty percent real property. I represented Valley Title Company. And I represented twenty real

estate brokers and five car dealerships. I had a complete general practice.

SOLOMON: Well you got . . . you got all your criminal cases on the car dealers then.

AGUILAR: What I always did I always did about twenty . . . twenty-five percent criminal. I tried six murder cases. I had the largest marijuana case in the United States at one time. Thirty tons of marijuana in San Diego.

SOLOMON: Jesus Christ.

AGUILAR: I had the largest marijuana case in this county when they were talking they never even heard of a kilo and I had two hundred and eighty-six kilos.

SOLOMON: Huh.

AGUILAR: I got the guy six months in the county jail.

SOLOMON: That's real good.

* * *

AGUILAR: Well when you . . .

SOLOMON: Go go ahead.

AGUILAR: When you call me . . . if you need to call me call me at work . . .

SOLOMON: Yeah I know (UI).

[31]

AGUILAR: And just say on, over the phone just say to me god I ran into some of our . . . our classmates.

SOLOMON: Yeah.

AGUILAR: And we oughta have lunch together.

SOLOMON: All right. All right. All right.

AGUILAR: And then we'll go from there.

SOLOMON: Okay.

AGUILAR: And what we're doin' is discussin' things about our classmates.

SOLOMON: Right right. Okay.

AGUILAR: Abe Joffe . . . say I ran into Abe Joffe.

SOLOMON: Abe Joffe. You have him in jail already you son of a bitch. (laughs)

AGUILAR: (laughs) I don't (UI).

SOLOMON: The poor bas . . . the poor bas . . . the poor bastard served thirty years as of today. No Abe is still still taps his fingers, you know?

AGUILAR: Nervous (UI)?

SOLOMON: Right and never gains a pound the bastard.

AGUILAR: Well you . . . you see those guys tell 'em I said hello to 'em.

SOLOMON: Yeah I don't see Abe, you know, he . . .

AGUILAR: They'd probably . . . they'd be shocked to learn I'm a federal judge. (laughs)

SOLOMON: Yeah. Well I think everybody knows, you know, ah either that or they're stupid uh but ah I don't see Abe that much ah, you know, once in a while and I but I hear about him through other people.

AGUILAR: Yeah.

[32]

SOLOMON: Um and, you know, you . . . he ah he does pretty good, you know?

* * *

AGUILAR: And always . . . well see I do a lot of travelling as a lawyer and now in San Francisco . . . I was supposed to be in San Francisco today at a judges' meeting.

* * *

SOLOMON: (laughs) Bob . . . hey Bobby . . .

AGUILAR: Listen I gotta go.

SOLOMON: . . . good seein' you, huh?

AGUILAR: But hey don't . . . Ed . . . don't worry about it. Seriously.

SOLOMON: I won't. But ah if I hear anymore I'll call you. Our classmates ah ah . . .

AGUILAR: Okay.

SOLOMON: . . . wanna get together . . .

AGUILAR: As far as I'm concerned we discussed a wrongful termination case. That's it.

SOLOMON: All right. Thank you.

* * *

[1] The following is a substantially verbatim transcript of a portion of a consensually recorded conversation which occurred on May 26, 1988, beginning at approximately 3:00 p.m., at San Jose California

* * *

ROBERT
AGUILAR: You're eating too much.

EDWARD
SOLOMON: Oh. What do you say Bob?

AGUILAR: I'll be with you in a moment. I'm gonna go to the bathroom then I'll be right back.

SOLOMON: You want some ah . . .

AGUILAR: No I don't want anything.

SOLOMON: You s . . . you want a cup of coffee?

AGUILAR: Glass of water's fine. No.

(PAUSE)

SOLOMON: Can we have ah two glasses of water? I don't know if he's gonna have anything else.

WAITER: Two glass of water?

SOLOMON: Yeah.

(PAUSE)

SOLOMON: Thank you.

WAITER: Uh hum.

(PAUSE)

WAITER: I know he gonna drink tea (UI).

SOLOMON: Okay. Fine. Hey whatever he ah wants you know?

Yeah.

SOLOMON: Give me the bill.
(PAUSE)
[2]
SOLOMON: The waiter says I know he's gonna drink tea. (laughs)
AGUILAR: Oh yeah. Okay.
SOLOMON: I can't fight him (UI).
AGUILAR: (UI) were you properly followed? (laughs)
SOLOMON: Huh?
AGUILAR: What's happening?
SOLOMON: Well I told you, you know, the guy talked to me Tuesday . . . this last Tuesday? When I came out of my driveway . . .
AGUILAR: Uh hum.
SOLOMON: . . . there were two guys from the F.B.I. . . .
AGUILAR: Uh hum.
SOLOMON: . . . wait. Let me find the thing here. I don't . . . I got one card. And ah he started to get on me. Yeah this guy. Thomas . . . well it has this . . . Thomas what?
AGUILAR: Carlon. Yeah.
SOLOMON: Yeah.
AGUILAR: Uh hum.
SOLOMON: Okay.
AGUILAR: He's not the one that talked to me. (UI).
SOLOMON: I don't . . . I don't know.
AGUILAR: Yeah he's not the one that talked.
SOLOMON: Ah he was waitin' for me, you know, where I live in Hillsborough and I . . . he

was waitin' for me. And there . . . and there was another guy with him.
AGUILAR: Uh hum.
SOLOMON: And they stopped me, you know, as I was driving off . . .
[3]
AGUILAR: Uh hum.
SOLOMON: Fortunately my house is sort of down and away . . .
AGUILAR: (UI).
SOLOMON: . . . yeah. Not ah visible, you know?
AGUILAR: Yeah.
SOLOMON: My wife is gonna think what the hell's goin' on. So they get out and they told me what was Rudy's and Abe's relationship.
AGUILAR: To each other.
SOLOMON: Yeah. And I said hey I don't know. They ah I guess they know one another but that's all I know they do, you know? Whatever they do they do by themselves.
AGUILAR: Yeah.
SOLOMON: Ah then he asked me um Abe's relationship to me. And I said hey I hardly talk to the guy you know, I don't . . . don't associate with him.
WAITER: Hello. How you doing?
AGUILAR: Fine. How are you today?
WAITER: Very good very good. You gonna have lunch?
AGUILAR: (UI).
SOLOMON: Want a little pie or somethin' or ice cream?

AGUILAR: No no I don't . . . this is (UI). No this is fine.

SOLOMON: You musta ate heavy for lunch.

AGUILAR: I just ate lunch.

SOLOMON: Yeah but you musta ate a heavy lunch.

AGUILAR: No.

SOLOMON: Okay. (UI), you know, what's . . . I can tell you I hardly know the man. I . . . I know him casually, you know? I seen him around. [4] That's about it. Then they asked me if I know any relationship between you and Abe and I says I don't know. You know? Period. I says I don't know anything.

AGUILAR: Who, me?

SOLOMON: Yeah. And ah then they ah asked me my relationship with Rudy I says that's client, you know, attorney privilege, you know, I says ah I can't ah go into that. Then they asked me about you and me. Yeah. So I says hey I know him I know his brother I know a lot of guys ah the . . . they went to school with me. We occassionally have lunch. We occasionally see one another, you know, but ah no big deal. You know? So then they asked me about do you have any relationship with Rudy I says hey I don't know, you know, I says . . .

AGUILAR: Me having any relationship with Rudy?

SOLOMON: . . . yeah I says hey, you know, what the hell do I know what ah, you know, you must think I . . . I live on Rudy's block,

you know, and I says I don't know what's goin' on, you know, with ah these different people, you know ask them. And I got a little salty with them and they got a little pissed at me and ah then they said ah, you know, ah we subpoenaed your toll calls. Records. Your phones. And ah I said hey ah good luck, you know? And ah then they got all on me then they said, you know, there's a grand jury goin' on now. We're gonna subpoena you. You know, I don't know. Then they ah they wanted to know if you had anything to do with Rudy's case. I says hey I don't know anything, you know?

AGUILAR: With Rudy's what?

SOLOMON: Case.

AGUILAR: Well you represent him, don't you?

SOLOMON: Yeah no no you.

AGUILAR: Whether I had anything to do with Rudy, huh?

[5]

SOLOMON: I says hey I don't know anything, you know, ah period, you know? I have no idea what the hell's goin' on but ah, you know, but a . . . they left and they . . . they told me they'd be back with a supoena for the grand jury and they have my records already so I don't know what the hell's goin' on. But they're gettin' me nervous these guys. I . . . I really wanna get out of that . . .

AGUILAR: Have you ever called me? You called me here at chambers.

SOLOMON: Yeah in chambers.

AGUILAR: That'll show toll calls.

SOLOMON: Right.

AGUILAR: They'll show that you did call me.

SOLOMON: Yeah.

AGUILAR: You called me several times.

SOLOMON: You know, yeah. Well ah a lot a times, you know, who, you know, they give me a subpoena what the hell am I gonna tell these ah . . .

AGUILAR: Well say we . . . we . . . we talked. We've been talkin' for years.

SOLOMON: Uh hum.

AGUILAR: When I was at San Francisco we would have lunch. And you would call me.

SOLOMON: Oh yeah. I know your brother and (UI) . . . . . you know, I'm worried about it because ah . . .

AGUILAR: Well you don't have anything to worry about. You represent the guy. You do whatever you can unless you do something unlawful. You didn't do anything unlawful. I'm the guy that's concerned if I have any . . . if I had any conversations with anybody. But my (UI) conversations that I had can be explained. I never asked him, you know, I'm sure that ah if there is anything that I've done that's . . . for which I should be worried. I shouldn't be involved at all.

[6]

SOLOMON: Yeah.

AGUILAR: But (UI).

SOLOMON: Well, you know, because if they . . . they're gonna ask me obviously what we've talked about ah, you know, ah when I called you. I'm gonna just tell 'em hey I, you know, we talked about how to do pleadings ah, you know, ah . . .

AGUILAR: We talked about Willie Brown we talked about Abe Joffe we talked Gabe Solomon (phonetic). We just talked personal matters.

SOLOMON: Yeah well.

AGUILAR: Your wife.

SOLOMON: My wife yeah.

AGUILAR: My girlfriend.

SOLOMON: But, you know, I'm just worried because ah . . .

AGUILAR: You never, have never asked me to intervene in any case in which you were a lawyer. Or never asked me to intervene in any case in which I was the judge or in which any of my fellow judges (UI). You never have.

SOLOMON: Well no. No. You know . . .

AGUILAR: Never have asked me to do anything like that. You've asked me procedural questions.

SOLOMON: Oh.

AGUILAR: Which lawyers ask me all the time.

SOLOMON: No I . . .

AGUILAR: But not on any of those cases.

SOLOMON: Well, the, the, I'll just tell 'em, I uh, we talked about procedural things ah ah I won't . . . I won't men . . .

AGUILAR: Once you asked me something about a wrongful termination case.

[7]

SOLOMON: Okay.

AGUILAR: That's all. I had never seen Rudy Tham and I've never talked to Rudy Tham.

SOLOMON: Okay.

AGUILAR: I . . . I never have.

SOLOMON: Hey I don't know who's who you know? All I know is that ah . . . somehow or other (laughs) between Abe and ah . . .

AGUILAR: But what caused it is they saw Abe at my house.

SOLOMON: Yeah. This Abe is terrible. You gotta stay away from him with a ten foot pole.

AGUILAR: No I have nothing to do with him anymore. But, you know, he's an . . . he's a . . . he's a relative.

SOLOMON: I understand.

AGUILAR: And he brings me sausage. He used to. He used to bring me sausage that his wife would send me.

SOLOMON: You know a little Jewy . . . ah Jewish?

AGUILAR: And some cookies.

SOLOMON: You know a little Jewish these guy're bringin' you Soares (phonetic).

AGUILAR: (UI).

SOLOMON: You know, I've been in . . . involved in . . . I nev . . .

AGUILAR: (UI).

SOLOMON: . . . I've never been involved in this shit before.

AGUILAR: But . . .

SOLOMON: I don't know what to say when they ask me.

AGUILAR: . . . (UI) no problem for you.

[8]

SOLOMON: Yeah well . . .

AGUILAR: All you gotta say is hey look, what is your question? Your question is did I ever talk to Judge Aguilar about Rudy Tham? The answer is no.

SOLOMON: All right.

AGUILAR: Did he ever bring up Rudy Tham to you? Not to my recollection. I don't know. Ah I don't think so. Did you ever ask Judge Aguilar to intervene? No. (UI).

SOLOMON: Well that's the . . . that's the truth. I never asked you to talk to anybody.

AGUILAR: Uh hum.

SOLOMON: But um all right. You know, I just wanted to know . . .

AGUILAR: I may have to . . . if they subpoena me I may have a problem. A real problem explaining my discussions with Judge Weigel. It depends on what Judge Weigel says.

SOLOMON: I have no idea. You know, that's . . . that's what's got me all disturbed. When this guy, you know, left ah, quit the case, you know, I got nervous. I said what the hell's happening?

AGUILAR: Maybe he quit the case because they went up to talk to him about me and the case. What did I do, did I go and intervene?

SOLOMON: Well all I can tell you is that ah, you know, I . . . I'm gonna get rid of Rudy. Ah, you know, ah I can't take this ah . . .

AGUILAR: (UI).

SOLOMON: . . . I'm havin' a nervous wreck.

AGUILAR: No, no. (UI) get out of it.

SOLOMON: You know, my . . . my ah family and ah my health conditions and shit, you know, the guy he doesn't pay anything and ah . . .

[9]

AGUILAR: Well if he doesn't pay you then get the hell away from him.

SOLOMON: (UI) he never paid me.

AGUILAR: It's not worth the grief. It's not worth the grief.

SOLOMON: It cost me . . . it cost me money.

AGUILAR: It's not worth the grief.

SOLOMON: I did it because of friendship but, you know, they ah they sort of use us I think.

WAITER: (UI).

AGUILAR: It's not worth the grief.

SOLOMON: You know? Thank you, huh? They sort of really . . .

AGUILAR: I personally, I didn't do anything.

SOLOMON: Well I'm happy.

AGUILAR: I know what I did but I mean I don't . . .

SOLOMON: Yeah I'm happy, you know? Because ah, you know, where we talked about it was

ah, you know, all you said was that they'll get a fair shake.

AGUILAR: See they never . . . when they talked to me they never asked me about Rudy Tham.

SOLOMON: Well (UI) me.

AGUILAR: But they never asked me about . . . they never mentioned him.

SOLOMON: Yeah.

AGUILAR: If they come and they ask me about him I'll say well I remember Abe asked me if I go to San Francisco often. And I says yeah. He says can you find out whether they're gonna have a hearing on a motion for Rudy Tham?

SOLOMON: No I know.

[10]

AGUILAR: And I'm gonna say well who's handling that? And he says Judge Weigel well I'll ask Judge Weigel.

SOLOMON: Uh hum. Well . . .

AGUILAR: (UI), you know? And I don't know who Rudy Tham is I don't know anything about him.

SOLOMON: I wish I didn't know.

AGUILAR: But see what you know you know as a lawyer. You haven't done anything else. You haven't bribed anybody.

SOLOMON: Well . . . I hope not.

AGUILAR: You haven't asked for any favor from any judge. So you have no problem.

SOLOMON: Right.

AGUILAR: You have no problem at all. Even if you went to the judge and said judge we got this thing . . . I wish, you know, you'd give this guy a break that's . . . that's what your . . . your job. You're a lawyer.

SOLOMON: Hey I wanna tell you somethin'. I don't even talk to the . . . the clerk in Weigel's court or Vukasin without notifying the U.S. Attorney's Office.

AGUILAR: No but I . . . I wouldn't think in my personal view you have done nothin' wrong.

SOLOMON: Okay. I'm happy ah, you know, but . . .

AGUILAR: You've done nothing wrong.

SOLOMON: . . . you know, I'm sixty years . . . gonna be sixty. (laughs) I don't know what the hell to do to start over. My old . . .

AGUILAR: Well there's no problem . . . no problem.

SOLOMON: . . . my old lady'd throw . . .

AGUILAR: Me too! How 'bout me?

SOLOMON: . . . my old lady'd throw me out.

[11]

AGUILAR: That's why I wouldn't do anything like that. I didn't do anything wrong. I wouldn't do anything wrong.

SOLOMON: No right. Anyhow . . .

AGUILAR: You know, I write letters of recommendation for guys. I don't see anything wrong with that.

SOLOMON: I . . . I shouldn't even bring this up but umm I think last time you said ah Abe's phone was ah . . .

AGUILAR: Did what?

SOLOMON: . . . Abe's phone was bugged?

AGUILAR: Oh yeah. Definitely.

SOLOMON: I wonder how you can tell I mean geez I'm gonna check . . . I don't even take phone calls from ah I gotta . . . I gotta check (UI) . . .

AGUILAR: But this morning you called me from the office, didn't you? The first call this morning . . . yesterday. When you called me yesterday.

SOLOMON: No no I was out in ah Santa Rosa.

AGUILAR: Oh okay.

SOLOMON: No I didn't call you from the office. I haven't called you today from the office . . . I called you down here when I was . . . because ah . . .

AGUILAR: But A . . . but Abe don't worry . . . you.

SOLOMON: (laughs) No I'm not Abe I'm Ed.

AGUILAR: . . . I mean Ed you didn't do anything wrong Ed.

SOLOMON: Okay.

AGUILAR: You didn't do anything wrong. The only problem is . . . is between Abe asking me to intervene with another judge and my intervening with another judge. What I did . . . oh no geez . . .

[12]

WAITER: (UI).

SOLOMON: Have another, you know, you could use the weight.

AGUILAR: But ah if I did anything at all . . . and it is . . . I went up, you know, what I did he

would never repeat so I (UI) know another judge come up and asked me something. I'm not worried about what he says.

SOLOMON: Okay.

AGUILAR: But they never asked me about this.

SOLOMON: Well okay well . . .

AGUILAR: If they ask me about that I'll say (UI).

SOLOMON: (UI) . . .

AGUILAR: All they asked me was about Abe.

SOLOMON: You know, that Abe and him hanging out everyday, you know, they ah . . .

AGUILAR: I haven't . . . I've never seen the man. I have never seen the man.

SOLOMON: I know I know I'm just saying.

AGUILAR: (UI).

SOLOMON: He . . . he, you know, he has that ah place in South San Francisco ah they hang out there with some candy as distributor.

AGUILAR: Beats the hell out of me.

SOLOMON: But ah . . .

AGUILAR: I'm . . . I'm . . . far as I'm concerned my conscience is clear.

SOLOMON: Good.

AGUILAR: Abe comes to see me as a friend. One time Abe asked me if I'd look into the date for a hearing and all I did was ask the judge if he'd set it for a hearing and what the hearing date was.

[13]

SOLOMON: All right.

AGUILAR: I don't think I discussed . . . I says I would have never discussed the merits of the case 'cause I don't know the god damn merits of the case.

SOLOMON: Mmm. Anyway, you know, it's just ah it's just a situation I, you know, I don't . . . (laughs) . . . in thirty years I haven't been investigated, you know, with the . . .

AGUILAR: (UI).

SOLOMON: . . . and the only one that's investigated me is the ah Internal Revenue called me and ah . . . (laughs) . . .

AGUILAR: Well what they're checking on is to see if anybody's trying to grease the rails.

SOLOMON: Mmm.

AGUILAR: And nobody's been doing that. Nobody's offered anybody any money. Nobody's . . .

SOLOMON: Hey. Hey please.

AGUILAR: . . . (UI) we don't do that kind of stuff. Shit I've never taken a bribe in my life and never will.

SOLOMON: Well . . .

AGUILAR: But the guy asked me a question to check something out I'm gonna check it out.

SOLOMON: Yeah.

AGUILAR: I don't see, where it's a matter of public record.

* * *

SOLOMON: Yeah.

AGUILAR: But Ed let me repeat this so . . . (coughs) . . . excuse me . . .

SOLOMON: Take it easy.
[14]
AGUILAR: . . . I don't know what was said in a phone conversation or phone conversations between you and Abe.
SOLOMON: Yeah. No I nev. . .
AGUILAR: But regardless of what was said . . .
SOLOMON: . . . I never talked to Abe. I only talked to Rudy.
AGUILAR: Okay. I don't think that there is anything that you did that involves an act of criminality. You were the man's lawyer you had a right to represent him in the way you saw fit. As long as you didn't offer a bribe to a public official as long as you didn't offer a bribe to another person to bribe a public official. There's nothin' wrong if in the sentencing process you ask somebody to talk to the judge. Okay? There's nothing wrong with that. But that was not done here. That was not done here.
SOLOMON: No I . . . I didn't talk to him.
AGUILAR: You haven't done anything wrong. You haven't done anything wrong so don't worry.
SOLOMON: Well okay. I just, you know, I just . . . I'm concerned about, you know, your and my relation and ah, you know, what the hell do I tell these guys when they get me up there.
AGUILAR: What you told 'em is right.
SOLOMON: All right.

AGUILAR: They didn't ask you have you discussed Rudy with Aguilar. Did they ask you that?
SOLOMON: Well they haven't, you know, that but they asked me what your relationship to Rudy was and ah, you know, next question is have I . . .
AGUILAR: None. I have no relationship to Rudy.
SOLOMON: No. The next . . .
AGUILAR: I don't know the man.
SOLOMON: No no.
[15]
AGUILAR: I haven't seen him.
SOLOMON: No they asked me our relationship and did you intercede in any way into Rudy's case. And I said none. You know, I says I know the guy. We went to school, you know, ah we have occasional lunches. His brother's a good friend of mine ah so then, you know, I . . . I . . . I . . .
AGUILAR: But did they ask you has he . . . did he intercede . . .
SOLOMON: Right.
AGUILAR: . . . in Rudy's case?
SOLOMON: Right right. And I said no. Why . . . why should he ah . . .
AGUILAR: I didn't intercede I asked a question. That I did. I remember that.
SOLOMON: Okay well ah, you know . . .
AGUILAR: (UI).
SOLOMON: . . . maybe that's what they . . . I guess that's why they subpoenaed my ah records ah.

AGUILAR: To see if you had any calls to me.

SOLOMON: Yeah. Yeah. Because ah, you know . . .

AGUILAR: And you have made calls to me.

SOLOMON: Oh numerous calls. Ah I don't remember what was said in all . . . (laughs) . . .

AGUILAR: I don't remember what was said either. There was a time when you were asking me a question about procedure . . .

SOLOMON: We asked you a question . . .

AGUILAR: . . . in a wrongful termination case . . .

SOLOMON: Yeah yeah yeah yeah yeah. And I mighta asked you a question or two about procedure, how to get things back on the calendar and, but Rudy.

[16]

AGUILAR: I don't . . . you may have mentioned the name Rudy. I don't know because I didn't know at that time I did . . .

SOLOMON: All right.

AGUILAR: . . . I still don't know anything about the case.

SOLOMON: Yeah. Well okay. 'Cause I . . . I, you know, I'll just tell 'em ah I know nothing. You know, I just, you know, let's hope it's like you say it is, you know? I don't know . . .

AGUILAR: (UI) asking procedure (UI) . . .

SOLOMON: I don't know . . . 'cause I don't know . . . you see . . .

AGUILAR: . . . you called me . . . did you call me home once or twice?

SOLOMON: I called you in Denver once because they insisted and you didn't even wanna talk to me. Umm I hadda call your house and the lady answered and gave me the number in Denver because ah Abie ah and him were going on me huckley-buck ah I says wh . . . wh . . . I don't even know the woman's name. What do you call her?

AGUILAR: (UI).

SOLOMON: And then . . .

AGUILAR: Was it my house?

SOLOMON: Yeah. You know, I . . . I, you know, I say what do I call her, woman?

AGUILAR: Yeah sure. (UI).

SOLOMON: And I . . . and I told her that Abe ah told me that . . .

AGUILAR: My daughter-in-law.

SOLOMON: I told her Abe ah told me to call to get your number and then I called Denver ah ah if you recall and then I asked you . . . they told me to call you and then you said I didn't tell anybody to call me. And then we talked about [17] you were going to some sort of school there to teach the other judges.

AGUILAR: Well if they bring it up say what's this call. 'Cause if it's a call to Denver they don't know it's a call to me.

SOLOMON: Yeah. Well that's ah, you know, but I don't remember what it is, everything.

AGUILAR: I think they're tryin' to get me.

SOLOMON: I don't know who they're tryin' to get. I

mean they're tryin' to get I think all of us. Somehow (UI) . . .

AGUILAR: Well I wouldn't worry about it anymore and we need not discuss this any further.

SOLOMON: Okay. Okay Weigel, when he dropped out . . .

AGUILAR: He may have dropped out because they came and asked him questions and he didn't wanna be involved.

SOLOMON: Well okay you gotta get back, huh? At four o'clock?

AGUILAR: Yeah. I got a hearing.

SOLOMON: Hey thanks for your time, you know, and if I hear anything ah I'll try to get . . .

AGUILAR: (UI).

SOLOMON: If anything develops I'll try to get in touch with you.

AGUILAR: Always call me by pay phone.

SOLOMON: Okay. Pay phone. Wait one minute I'll go out here with you. How's Jessie?

* * *

AGUILAR: All right senor.

SOLOMON: Anyhow . . .

AGUILAR: Don't worry.

SOLOMON: Okay thank you.

[18]

AGUILAR: Don't . . . you don't worry.

SOLOMON: All right. Thank you Bob.

(PAUSE)

AGUILAR: I'm looking around and I don't see any of them . . . the F.B.I. around (UI).

SOLOMON: I . . . I don't think I'm, you know, followed, you know, but ah . . .

AGUILAR: They follow everybody else.

SOLOMON: Hey . . . (laughs) . . . leave me alone.

AGUILAR: (UI).

SOLOMON: That's all I need and my wife ah . . .

AGUILAR: Well I'm surprised that they waited for you (UI) whey didn't they just call you and make an appointment.

SOLOMON: Well hey they . . . the city they do it a little different there, you know, they . . .

AGUILAR: Maybe they like the element of surprise.

SOLOMON: . . . they ah went down ah and wait outside your door. Ah they like to catch you off guard I guess.

AGUILAR: Yeah the element of surprise. (UI).

SOLOMON: And in your weaker moments, you know, you're in a trauma.

AGUILAR: Yeah right.

SOLOMON: You're traumatized. Just like the I.R.S. All right Bob.

AGUILAR: Take it easy.

* * *

[1] The following is a substantially verbatim transcript of a portion of a consensually recorded conversation which occurred on June 22, 1988, beginning at approximately 2:26 p.m.

* * *

SPECIAL AGENT THOMAS J. CARLON: Yeah I'm Tom Carlon with the F.B.I. We have an appointment with Judge Aguilar.

UNIDENTIFIED MALE: Oh.

DAVID SIPIORA: Our secretary's out here (UI).

((UI)—several people speaking simultaneously.)

SIPIORA: Oh hi. How you doin'? I'm Dave Sipiora.

CARLON: Hi Dave, how're you?

SPECIAL AGENT DONALD MAX NOEL: Hi judge, Ah . . .

ROBERT AGUILAR: Hi, come on in.

CARLON: Oh hi judge, how you doin'?

AGUILAR: Give me one second. I'll be there in a second.

NOEL: Thank you very much.

CARLON: Oh sure.

(Pause)

NOEL: It's cloudin' up again. Pretty though.

[2]

CARLON: Yeah, perfect.

* * *

AGUILAR: It just went to the jury.

CARLON: Oh no kiddin'?

AGUILAR: About three weeks in trial.

NOEL: Three weeks of trial?

AGUILAR: Yeah.

NOEL: Oh boy.

AGUILAR: Well not steady. See I'm . . . they don't try cases on Monday here. They have law and motion. So they don't try cases on Monday and then ah one Friday was a holiday. King Kamehameha's birthday so there was no work that day.

CARLON: That's my son's birthday too. He was born here at Tripler.

AGUILAR: Was he?

CARLON: Yeah.

AGUILAR: Yeah and then one other day um one of the defendants was sick.

CARLON: Mmm.

AGUILAR: Or one of the defense counsel was sick so . . . yeah they don't work too hard around here.

CARLON: (laughs)

NOEL: It's a great pace of life.

AGUILAR: Oh yeah.

NOEL: It's a great pace of life.

CARLON: I ah I was here ah after the Vietnam war our whole squadron pulled out.

AGUILAR: Oh yeah.

CARLON: And ah I was in Kaneohe for three and a half years.

[3]

AGUILAR: Were you in the Marine Corps?

CARLON: Yeah.

AGUILAR: Yeah.

CARLON: Yeah and I tell ya the I cried the day I left here.

NOEL: (laughs)

CARLON: I just loved it so much.

AGUILAR: It's easy duty. It would drive me nuts though. I . . . I couldn't . . .

CARLON: Really?

AGUILAR: . . . no I couldn't . . .

CARLON: Well I was still flyin' so I could fly to the other islands. I could go places, you know?

AGUILAR: Oh yeah that really helps.

CARLON: Get the Maui potato chips and whatever else.

(laughter)

NOEL: Just what we all . . . just what we all need is Maui potato chips.

AGUILAR: Yeah.

CARLON: Listen let's not take up too much of your time.

AGUILAR: Uh hum.

CARLON: The reason we're here is we do have some . . . since we talked last in . . . in San Jose . . .

AGUILAR: Right.

CARLON: . . . in . . . in early April some allegations ah concerning an individual by the name of Rudy Tham, okay? And I don't know if you know who he is or not . . .

AGUILAR: Oh, I know who he is.

CARLON: Oh you do?

[4]

AGUILAR: Yeah, I mean I know of him.

CARLON: Oh okay.

AGUILAR: You know, I know that he's a union man of some kind.

CARLON: Okay, Rudy Tham ah for your information ah was convicted in I believe 1980 of embezzlement of union funds.

AGUILAR: I know that he was convicted.

CARLON: Okay. And largely through the efforts of Jimmy Frattiano who was a government witness and then there were some corroborating wire taps, he was convicted. He went to . . . I think he went to jail for four months or something. And Judge Weigel was the . . . was the judge the sentencing judge . . . the . . . the one that heard the entire case. What's come to our attention . . . and basically through Abe Chapman and . . . and some of the things that are goin' on with him is that there is an allegation which has surfaced that Abe may have come to you asked about Rudy's case and

then in turn you may have gone to Judge Weigel and attempted to intervene ah whatever about the case. And that's why we're here.

AGUILAR: Okay. Let me ask you, am I some kind of a target?

CARLON: Well uhm I think at this point . . .

AGUILAR: I assume from this . . .

CARLON: . . . I mean . . .

AGUILAR: . . . that I very likely am if I've done anything wrong.

CARLON: Yeah.

AGUILAR: I'll tell you what, I have no problem telling you what I did.

CARLON: Okay.

AGUILAR: I was asked . . . and I am not absolutely positive whether it was from ah from Chapman.

CARLON: Okay.

[5]

AGUILAR: But I was asked to find out about when there would be a hearing on a motion.

CARLON: Okay.

AGUILAR: And nothing more than that.

CARLON: Is this on the Tham matter at all?

AGUILAR: On . . . on Tham. Yeah.

CARLON: Okay.

AGUILAR: There I was told that there was a motion pending and said can you find out when it's going to be on the calendar. And that was

the extent of my quote intervention or my quote re . . . what was requested of me to do.

CARLON: Okay.

AGUILAR: I then two or three weeks after the request was made I was in San Francisco and I asked Weigel in passing when he was gonna have the matter heard on his calendar and he says hell I don't know. You'll have to ask my clerk. Now I don't remember now whether he immediately called the clerk and asked him when it was on the calendar.

CARLON: Oh okay.

AGUILAR: . . . or whether he just told me I don't know. But I never got a date. I never got a date as to when it was going to be on the calendar.

CARLON: Okay.

AGUILAR: Now as to whether I was asked to intervene beyond that . . .

CARLON: Uh huh.

AGUILAR: . . . and . . . and talked to him about the case the answer is no. I have never discussed the merits of the case with him.

CARLON: Okay.

AGUILAR: To my best recollection.

CARLON: All right.

[6]

AGUILAR: I remember reading in . . . in Herb Caen's column about it. And maybe even in the newspaper itself in . . . in the news section. Beyond that no. Did not.

CARLON: How many times did you discuss that with Judge Weigel?

AGUILAR: Just one time.

CARLON: Now do you recall about when that would've been?

AGUILAR: Either late last year or early this year. And I seem to think late last year was . . . no since it . . . it involved merely the asking of . . . of when the thing's on the calendar, you know?

CARLON: Yeah.

AGUILAR: We're asked those questions all the time. Lawyers asking, you know, when is this thing gonna be on the calendar.

CARLON: Oh sure. Sure.

AGUILAR: And I uh and I and I check.

CARLON: Okay.

AGUILAR: But uh to actually . . .

CARLON: (UI).

AGUILAR: . . . discuss the case with him and say hey you how you oughta do this, you oughta do . . . I would never presume to ask another judge that and especially someone like Stanley Weigel.

CARLON: (laughs) Is that right?

AGUILAR: Yeah oh shit he'd go hey get the hell out of here. It's none of your god damn business.

NOEL: (laughs)

AGUILAR: I mean if somebody asked me the same thing . . .

CARLON: Sure.

AGUILAR: . . . don't . . . we don't . . . we just don't dis . . . you know, we discuss cases on a educational level.

[7]

CARLON: Sure. Sure.

AGUILAR: But never personally. And I would never intervene and I don't know this guy Tham.

CARLON: Where . . . where . . . where does the line get drawn on that? Just for my own information.

AGUILAR: Okay. Now if it is say a criminal proceeding . . .

CARLON: Uh hum.

AGUILAR: . . . and it comes to sentencing I might write a letter to a judge.

CARLON: Mmm hmm.

AGUILAR: Say I know this guy and, you know, this is my suggestion. I've done that many times.

CARLON: Uh hum.

AGUILAR: Now . . . but to go up and see one personally before there has been a conviction either by plea of guilty or otherwise I would never go talk to him about it.

CARLON: I see.

AGUILAR: If I was just intellectually interested in the case and not knowing any of the parties and not wanting to convey what I'm gonna learn to 'em . . .

CARLON: For . . . for your own professional enhancement.

AGUILAR: Yeah. I'll go over and . . . I'll go over and discuss it with him.

CARLON: Sure.

AGUILAR: I'll go over and discuss it. Like ah I've gone up to Judge King here and discussed the case I have here the problems say geez can you imagine this is what happened in the courtroom where . . . and . . . and then we bounce things off each other.

CARLON: Sure.

AGUILAR: But to do something as a favor for someone to get the ultimate decision swayed one way or the other I'd never do that.

[8]

CARLON: That's where the line . . .

AGUILAR: And I never have.

CARLON: . . . that's where the line gets drawn.

AGUILAR: Absolutely.

CARLON: Okay.

AGUILAR: And I'd never . . . never do anything like that at all.

CARLON: Okay. Ah what Tham I guess had going was some sort of petition an ah . . . 2255 . . .

AGUILAR: 2255.

CARLON: Oh you . . okay.

AGUILAR: It was a twenty-two fif- . . . and that's what I asked him when is this 2255 hearing.

CARLON: Okay.

AGUILAR: And what . . . it's merits, you know, that's not something I cared about or discussed.

CARLON: Okay. Did you know ah Rudy Tham's attorney Ed Solomon?

AGUILAR: I've known Ed Solomon since nineteen hundred and fifty-five.

CARLON: Oh, you're kidin'?

AGUILAR: Yeah.

CARLON: Oh.

AGUILAR: I've known him . . . I was in law school with him. He's a very personal friend of my brother's.

CARLON: Oh.

AGUILAR: My brother Jess who's a lawyer.

CARLON: Uh hum.

AGUILAR: They were classmates. And I have from time to time when I was in the city have lunch with him. [9] I . . . when he comes to San Jose he'll call me and we'll have lunch or we'll meet for a drink. When I used to drink. And ah but we are personal friends.

CARLON: I see. I see. Did you know that Solomon was Tham's attorney?

AGUILAR: I have found that out recently.

CARLON: Uh hum.

AGUILAR: I did not know that long ago.

CARLON: How . . . how did you find that out?

AGUILAR: Ah my brother's son told me that his ah that his grandfather . . .

CARLON: Uh huh.

AGUILAR: . . . Chapman wanted to tell me that . . . that the F.B.I. is questioning about my doing something.

CARLON: Oh okay.

AGUILAR: So he's sorry he can't come and see me anymore or can't talk to me anymore.

CARLON: I see.

AGUILAR: And that if ah if I need to know more about it I can call Rudy Tham's attorney Ed Solomon.

CARLON: I see. Okay.

AGUILAR: And I haven't had occasion to call Mister Solomon.

CARLON: Okay. Uh in some of your luncheon meetings with Mister Solomon did he discuss ah the Rudy Tham matter with you at all?

AGUILAR: No. No.

CARLON: Oh. So . . .

AGUILAR: Mostly we talk about another federal judge we know.

CARLON: Oh who's that?

AGUILAR: (UI). Earl Gilliam.

[10]

CARLON: From San Diego?

AGUILAR: (UI) from San Diego.

CARLON: Oh.

AGUILAR: Yeah we were all friends. The three of us . . .

CARLON: Oh is that right?

AGUILAR: . . . were friends. And ah he's always telling me that he . . . he talked to Earl. Earl calls him maybe every other week.

CARLON: Allrighty. Well I'm . . . we're sorry to put you on alert here like this but you understand that . . .

AGUILAR: Oh, oh of course.

CARLON: . . . that there is a job that has to be done. And the allegations are serious.

AGUILAR: I understand and I understand you're doing your job but I wanna make this very clear.

CARLON: Okay sure.

AGUILAR: I have . . . I don't know Rudy Tham.

CARLON: Okay.

AGUILAR: I don't know him. I've never met him and . . .

CARLON: That was gonna be my next question.

AGUILAR: To the best of my knowledge I have never met him.

CARLON: Okay.

AGUILAR: Um, you know, you know, I wouldn't know him from a load of wood. If he walked in here now I wouldn't know who he was. And I have never had a face-to-face conversation with him. I have never discussed his case.

CARLON: Okay.

AGUILAR: Never discussed his case in any way whatsoever with him. And I have never attempted to have his . . . a decision in his case rendered one way or the other.

[11]

CARLON: Did you know anything about that case at all?

AGUILAR: No. And I still really don't know anything about it.

CARLON: Oh okay.

AGUILAR: I know it involves this guy Frattiano.

CARLON: Uh hum.

AGUILAR: But, you know, beyond that I don't know anything about it.

CARLON: That was pretty much public knowledge . . . I mean that . . . it did get a pretty good splash back in 1980.

AGUILAR: I'm sure I read about it. But, you know, to know about it in terms of discussing it with Solomon or with ah Abie . . .

CARLON: Uh hum.

AGUILAR: Ah no. Or even with a judge I've never discussed it with a judge.

CARLON: Would there be something wrong with discussing it with Solomon, do you think?

AGUILAR: No.

CARLON: But you didn't do that?

AGUILAR: No because I'm not . . . um it's not my case.

CARLON: Mmm.

AGUILAR: It's not my case.

CARLON: I see.

AGUILAR: I would see nothing wrong with discussing it with him.

CARLON: I see. But it . . . the subject never came up?

AGUILAR: No. We simply didn't discuss it.

CARLON: All right. Let's see here.

[12]

AGUILAR: Ah if it was my case . . .

CARLON: Yeah.

AGUILAR: . . . I would never discuss it.

CARLON: Oh that's . . . yeah. That's . . .

AGUILAR: You know, I'd never discuss it with him. But out of the presence of the other . . . the other side the government side.

CARLON: Okay.

AGUILAR: But ah but if it didn't involve me . . .

CARLON: I wonder . . .

AGUILAR: You know about this case and they start going (UI) then if it gets to a point where they're . . . they're trying to get something from me then I cut it off.

CARLON: Oh okay.

AGUILAR: If they wanna discuss their case fine they can discuss their case. What I have discussed with Gabe Solomon . . . or Abe Solomon. I call him Gabe 'cause there's a reason. Or it is Gabe. (UI).

CARLON: No Ed Solomon.

AGUILAR: Ed Solomon. Well there was a Gabe Solomon in our class.

CARLON: Oh.

AGUILAR: And there's Abe Solomon.

CARLON: Oh.

AGUILAR: And there's an Abe Joffe. And sometimes I call him Abe Joffe.

(laughter)

AGUILAR: (UI) made that mistake always. Ah he oh many years ago asked me ah some federal procedural question. I don't even . . .

CARLON: Who is this now?

AGUILAR: Ah Solomon.
[13]
CARLON: Oh oh.
AGUILAR: But I don't even . . . he never told me the case.
CARLON: I see.
AGUILAR: You know, he just . . . and lawyers will call me for advice like that all the time.
CARLON: Oh sure. Yeah.
AGUILAR: And I will give them advice. First I ask them is it a case that's before me. And if it isn't then fine.
CARLON: Okay.
AGUILAR: And then I think one other time he ah asked me how to proceed on a um wrongful termination or employment discrimination.
CARLON: When was . . . when would that have been?
AGUILAR: Within the last year and a half. And how to frame a complaint. But it . . . it wasn't . . .
CARLON: What's a wrongful termination like . . .
AGUILAR: You fire somebody wrongfully.
CARLON: Oh. Oh I see.
AGUILAR: When you fire . . .
CARLON: That's a civil matter, is that what that is?
AGUILAR: It's a civil matter.
CARLON: Oh okay.
AGUILAR: It's a civil matter.
CARLON: What would he be . . . have asked you about that? Do you recall?

AGUILAR: Well probably what the leading cases are.
CARLON: Oh I see.
AGUILAR: Or how to prepare a complaint.
[14]
CARLON: I see.
AGUILAR: I lecture on this stuff so that's why people . . . and a matter of fact today I got a call to lecture I think it's November 14th and 15th on securities fraud. I get . . . and since I've been here I've got three calls. One from ah ah Manny Real the chief judge who wants me to give a lecture ah to the practicing law institute and ah then I got the securities fraud lecture today and then someone from the administrative office called me to give a lecture.
CARLON: I see.
AGUILAR: On . . . on judicial ethics.
CARLON: I see.
AGUILAR: So I give . . . I give two speeches or lectures on average a week. I give over a hundred a year.
CARLON: I see.
AGUILAR: I get these calls also because I do a lot of teaching . . .
CARLON: Sure.
AGUILAR: . . . people call me about it.
CARLON: Sure. Well you I guess you consider that one of your duties (UI).
AGUILAR: Yeah but . . . I do but people don't call me to intervene.

CARLON: Okay.

AGUILAR: And if they do I don't intervene.

CARLON: Okay I understand. Ah . . .

AGUILAR: I don't know what Judge Weigel said. I don't think he said anything different from what I said but . . .

CARLON: Mmm hmm.

AGUILAR: That's my recollection. That's what happened in our conversation.

[15]

CARLON: Okay. Have you talked to Judge Weigel (UI) . . .

AGUILAR: I have not and I do not intend to.

CARLON: Okay.

AGUILAR: If I start to talk to him I know he'd say Bob I don't wanna discuss it with you.

CARLON: Mmm.

AGUILAR: So I don't know what he said.

CARLON: Okay.

AGUILAR: He wouldn't tell me and I wouldn't approach him.

CARLON: Okay.

AGUILAR: As far as I'm concerned I didn't do anything wrong.

CARLON: Okay.

AGUILAR: I merely wanted to find out a date for a hearing.

CARLON: And this was Tham's 2255?

AGUILAR: The 2255.

CARLON: Would that have been an evidentiary hearing?

AGUILAR: I have no idea.

CARLON: Okay.

AGUILAR: They don't have to be evidentiary hearings. They can be submitted on the papers without any testimony.

CARLON: Oh.

AGUILAR: And just arguments. So I don't know which way he was . . .

CARLON: I see.

AGUILAR: . . . gonna proceed.

CARLON: Would there have been oral arguments in this one?

AGUILAR: I have no idea.

[16]

CARLON: Okay.

AGUILAR: All I know is . . .

CARLON: I'm not tryin' to trick you. (laugh)

AGUILAR: . . . it never got . . . no it never got set.

CARLON: I see.

AGUILAR: And I never found . . . I says I'm sorry I . . . he doesn't know.

CARLON: Okay. Not to beat a dead horse but when we first asked you abut this you said that you may have possibly been asked by Chapman to go find out about . . .

AGUILAR: It may have been him who asked me or it may have even been Solomon but I don't think it was Solomon because I never discussed it with Solomon.

CARLON: Okay.

AGUILAR: But ah but um ah Abe Chapman may have asked me. There had to be a reason why I wanted to know.

CARLON: Uh hum.

AGUILAR: And it may have been that . . . that Abie asked me.

CARLON: Okay. All right. Let me stop it here a little bit. Let me tell you something that . . . that we've done with him that seems a little bit out of the ordinary to us but may not be to you and maybe you can explain it a little bit. We have had surveillances of Abe Chapman as you know as we discussed the last time.

AGUILAR: Oh yeah you showed me pictures of him at my house.

CARLON: Yeah.

(laughter)

CARLON: Um there have been times when he has left his house, gone to a pay phone on Railroad Avenue . . .

AGUILAR: Uh hum.

[17]

CARLON: . . . called and gone back to his house. And when we received the records from Pacific Bell we noticed on one occasion . . . I forget the date . . . he called your house I think . . .

AGUILAR: Did he talk to me? I don't know.

CARLON: I don't know.

AGUILAR: He has called me but I don't know whether he's called from a pay phone. I don't know where he calls me from.

CARLON: Okay well and then . . .

AGUILAR: He's called me on the road I know. because he'll call me before he comes over. And that's about the only time he ever calls me. That I've talked to him.

CARLON: Okay. Ah he's also called your chambers.

AGUILAR: Um he has called me one or . . .

CARLON: (UI).

AGUILAR: . . . and reached me once. Once he reached me.

CARLON: One time?

AGUILAR: One time he reached me.

CARLON: Okay.

AGUILAR: And the other times he, you know, wasn't there.

CARLON: Okay.

AGUILAR: I wasn't there.

CARLON: I can't remember that. (UI) What that suggests to me um, you know, and I . . . maybe I'm being a little bit more inquisitive than I should be or reading something into it . . .

AGUILAR: You can ask anything you want.

CARLON: But guys that do that are tryin' to hide something. Ah and they suspect perhaps that their phones are tapped. I don't know. I've seen that happen a lot.

[18]

AGUILAR: Well he can't have learned that from me because I don't . . . I don't know anything about that.

CARLON: Okay well that was gonna be my question. Did you ever learn anything about any wire tapping?

AGUILAR: (UI) I have no way of knowing that.

CARLON: Okay.

AGUILAR: I don't have no way of knowing that. Whenever I sign a wire tap order I'm the only one who knows it and the guy to whom I give the order.

CARLON: Okay.

AGUILAR: If it's learned it's learned from the guy I gave the order to. I'm . . . I never . . . I don't even tell my staff.

CARLON: Okay. Did you ever find out or learn of any wire tap order on Abe Chapman (UI)?

AGUILAR: No.

CARLON: Okay. I mean his conduct just kind of suggested that he was being real careful.

AGUILAR: He . . . everything he does and acts as long as I've known him has always been very clandestine.

CARLON: (laughs) Okay.

AGUILAR: (UI) . . .

(laughter)

AGUILAR: . . . shit I don't know what the hell he's doin'.

CARLON: He went to trial the other day (UI).

AGUILAR: Did he go to tri . . . he's in trial?

CARLON: Funny story.

AGUILAR: Yeah you had told me that they . . . they re-indicted him or someone said he was . . .

CARLON: No he was . . .

AGUILAR: The court reversed it you said.

[19]

NOEL: Uh hum.

CARLON: I think there were there were that there were several points that Judge Orrick had thrown out and that were overturned by the Ninth Circuit so it's been . . . it's been lingering and I'm not totally familiar with the whole case.

AGUILAR: Has the jury returned?

CARLON: Oh, no they (laughing). That's what I was gonna tell ya. They they didn't even get past pickin' the uh jury. They were at voir dire at uh uh somebody recognizes one of the defendants halfway through after (UI).

AGUILAR: One of the jurors did?

CARLON: One of the jurors said oh I know that guy wasn't he the subject of a sexual discrimination suit?

(laughter)

CARLON: And everybody kind of went . . .

AGUILAR: Oh my god there we've got another mistrial.

CARLON: So it was . . . it was kind of funny we all laughed. And ah Mister Chapman was out in the hall and I went out and talked to him a little while and . . . and he said ah well I . . . I don't hold anything against you

(UI). I said well you better not (UI). He is a . . . he is a character he really is and he does . . . he, you know, poor guy he's eighty-some-odd years old I guess. Okay but . . . but his conduct . . . gettin' back to that . . . to me suggested that he might be ah fearful at least that his phones were tapped.

AGUILAR: Well that seems reasonable to me. (UI) fear of that geez.

CARLON: (UI) and once again I had to ask the question . . .

AGUILAR: (UI) not from me 'cause I . . . I don't have that knowledge.

CARLON: Okay. If you did would you ever tell him?

AGUILAR: No.

CARLON: Okay. Allrighty. Anything you wanna ask of us?

[20]

AGUILAR: Well I did ask you that one question, if I'm the target?

CARLON: Well certainly some of this evidence is pointing in your direction and I'd have to say yes, you know, um there is a Grand Jury meeting. Convening I guess that's the correct word. (laughs) Um some evidence will be heard I'm . . . I'm sure on this issue.

AGUILAR: But is there a Grand Jury convened to determine whether or I'm . . . I'm not I in some way I . . .

CARLON: I don't know if I can tell you that. I mean what's . . . is there a 6(e) rule prohibiting me from telling you that? I don't know.

AGUILAR: You're not supposed to tell anyone ah what a Grand Jury is meeting about.

CARLON: Okay so . . .

AGUILAR: So you can't tell me if I'm . . .

CARLON: Okay good.

AGUILAR: . . . if you're seeking indictment against me or if the U.S. Attorney's seeking indictment against me.

CARLON: Why don't we just leave it at that then?

AGUILAR: Okay.

CARLON: If you have any questions ah you can call me. I'll leave you . . . leave you my card. Okay?

AGUILAR: All right.

NOEL: I left you my card last time, so you've got mine. Yeah.

AGUILAR: Yeah I . . . I obviously I'm concerned now.

CARLON: Uh hum.

AGUILAR: You know, obviously I'm concerned.

CARLON: Well I can . . . I can appreciate that.

AGUILAR: But um . . .

[21]

CARLON: And I don't know what to tell you. I don't know whether to try to allay your fears or to perk you up. Obviously we came to Honolulu to see you. Um . . .

AGUILAR: Yeah (UI) this is a matter that uh (UI).

CARLON: It didn't take a whole lot of creative writing, you know, even though I used to live here.

(laughter)

CARLON: All right?

AGUILAR: But I mean obviously I'm concerned that ah that, you know, there . . . there's gonna be some . . . perhaps be a Grand Jury's gonna meet to determine whether or not they should return some indictment again . . . against me for obstructing justice . . .

CARLON: Okay.

AGUILAR: . . . in any but I know what obstructing justice is and . . .

CARLON: Well you said you're . . . you're not guilty of anything so . . .

AGUILAR: Right and I'm not guilty . . .

CARLON: Okay.

AGUILAR: Of . . . of any wrongdoing. So I'm not . . .

CARLON: Yeah.

AGUILAR: You know, in my own mind I'm not worried but . . .

CARLON: Okay.

AGUILAR: . . . necessarily there's some . . . some . . . concern.

CARLON: Okay. Well if we can keep the Grand Jury proceedings secret and um . . .

AGUILAR: That's the way they should be.

CARLON: . . . you know, maybe it'll go away.

AGUILAR: Uh huh.

CARLON: I mean that's I guess what you would hope for.

[22]

AGUILAR: Of course a lot depends on what ah what Judge uh Weigel has to say.

CARLON: Mmm.

AGUILAR: I . . . I feel like I wanna ask him and talk to him about that.

CARLON: Yeah I can appreciate that.

AGUILAR: But I . . . I don't . . . I don't think I should talk to him. I have no intention to.

CARLON: Okay.

AGUILAR: I, I had decided when you guys came to me the first time that as far as . . . as what's-his-name was concerned . . . Abie . . . I wasn't gonna talk to him and I have not.

CARLON: Mmm.

AGUILAR: And now that you bought this up which is an entirely different thing from what you talked to me abut the first time.

CARLON: Well that's kind of funny. I . . . I think I did ask you a general question about . . .

AGUILAR: Well you asked me if I had intervened on his behalf.

CARLON: Right.

AGUILAR: In any case.

CARLON: I did.

AGUILAR: And I've never intervened on his behalf in any case.

CARLON: Okay.

AGUILAR: And now you're asking an entirely different question.

CARLON: Right.

AGUILAR: As to whether I have intervened on behalf of some Rudy Tham, whom I don't know.

[23]

CARLON: Okay.

AGUILAR: And the answer to that is clearly no.

CARLON: Okay great. I um . . .

AGUILAR: And the other one's still the same no.

CARLON: I did ask you a general question about would you intervene on . . . on Abie's behalf or anybody I mean on . . . on any of Abie's friends. I think we discussed Michael Rizzitello and . . .

AGUILAR: (UI) name.

CARLON: And some of these other characters that . . .

AGUILAR: I don't think you asked me that.

CARLON: Okay.

AGUILAR: But ah if you had my answer would sure . . .

CARLON: Sure.

AGUILAR: . . . have been the same as it is now. No.

CARLON: Okay. Okay great.

NOEL: What . . . what is Rudy's . . . ah what is Abie's relationship with Rudy Tham?

AGUILAR: I have no idea.

CARLON: Okay.

AGUILAR: I have no idea. All I know is he asked me about this to find out when his 2055 . . . 2255 . . .

NOEL: Okay that and then . . . right.

AGUILAR: . . . would be heard. He said he said do you have any way of know when a . . . a case'll be heard. And I says yeah check the calendar.

NOEL: Well sure.

AGUILAR: Which I did do. I checked the calendar there was nothing so then I asked . . .

[24]

NOEL: But you . . . you aren't aware of any relationship between Abie and Rudy Tham of . . . of . . . I mean it's not like . . .

AGUILAR: Not other than they know each other.

NOEL: Okay but I, you know, they're not like shirttail relatives or . . . or anything of that nature?

AGUILAR: No.

NOEL: Okay.

CARLON: All right. Well we'll leave you alone. How's that?

AGUILAR: Well that's fine.

CARLON: Where you been goin' out to dinner around here?

AGUILAR: You gonna leave me in a good condition? (laughter)

AGUILAR: Well, last night I ate dinner in.

CARLON: Mm.

AGUILAR: The previous night ah I went out to dinner at ah Kobe.

CARLON: Uh hum.

AGUILAR: Which is that little steak house across next to the Ilikai.

CARLON: Uh hum.

AGUILAR: And then a couple of evenings before that I went to High Steak House and tonight I'm gonna go to the Golden Dragon.

CARLON: Oh good. Um . . .

AGUILAR: I eat in every other night.

CARLON: Have you been over to the Windward side at all over there?

AGUILAR: Not to eat. I drove around there.

CARLON: Um . . .
[25]

AGUILAR: We were there Sunday. We went . . . the whole staff. I took the whole staff up there to . . .

CARLON: Okay.

AGUILAR: . . . to . . . to Judge Complin's home for dinner Sunday night.

CARLON: Oh how neat. There's a great place over there. I mean it's . . . it's simple but it . . . the setting is really neat. It's called Buzz's Steak House. It's not the one . . .

AGUILAR: Oh yeah I know where Buzz's Steak House is.

CARLON: In Lanakai.

AGUILAR: The one in the hotel?

CARLON: No no. No no this is over in Lanakai on the Windward side. Right on the beach.

AGUILAR: Yeah but that's a hotel next to it.

(laughter)

AGUILAR: There're about (UI) yeah there's this apartment house or hotel right there.

CARLON: This is over by Kailua.

AGUILAR: Yeah by Kailua yeah.

CARLON: Then you make a right and you go down. They built an apartment house there?

AGUILAR: Well it's been there for years.

CARLON: Oh.

AGUILAR: The original Buzz's was there. Then they have two or three other Buzz's.

CARLON: Oh I know they got one in Kaimuki I think and . . .

AGUILAR: Yeah.

CARLON: . . . (UI).
[26]

AGUILAR: But that ah original one is right next to the hotel. It's a hotel. I forget the damn name of it. I just drove by it ah Saturday afternoon.

CARLON: Oh. Oh. Well I love that place. I really eat there.

AGUILAR: Yeah that Buzz's steak house . . . and then he makes those mixes for mai tais.

CARLON: Oh does he? Well stay away from those.

(laughter)

AGUILAR: I don't drink. I . . . I haven't consumed alcohol for over five years.

CARLON: Oh is that right?

AGUILAR: I'm diabetic so I don't do that.

CARLON: Oh that's . . .

AGUILAR: You know?

NOEL: Mm boy yeah.

CARLON: Well listen we're not gonna . . .

AGUILAR: Well I miss the fact that I can't even get any more Italian sausage from Mrs. Knaack.

(laughter)

CARLON: Well don't worry about that. Go get it.

NOEL: You can get some good Portuguese sausage here.

CARLON: Where does she get that by the way, do you know?

AGUILAR: I have no idea. I have no idea.

CARLON: All right. Well listen thanks for your time.

AGUILAR: As you can see my conversations with him aren't very long, you know, and my and my visits with him aren't very long. He'll call me and say well I saw your mother and father they're fine goodbye.

(laughter)

AGUILAR: And that's it.

[27]

NOEL: That's the way he drives the car too.

AGUILAR: Oh he's a maniac with the car. Thank you very much.

NOEL: Well thank you.

CARLON: Thanks for your time (UI).

AGUILAR: Okay (UI).

NOEL: We appreciate it and have a . . . how long will you be here?

AGUILAR: 'Til ah June 30th.

NOEL: Oh golly that's nice, that's nice.

AGUILAR: Yeah.

CARLON: It's a good deal.

AGUILAR: We . . . we finished . . . we're gonna finish this case when the jury comes out but I've got another one. I've got two ah kilos of

cocaine and a motion to suppress that I'm working on right now.

CARLON: Oh okay.

NOEL: Well thank you for your time.

AGUILAR: So long.

NOEL: Okay. Bye. Thank you.

CARLON: Thank you.

AGUILAR: So long.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. CR. 89-365 LCB

UNITED STATES OF AMERICA, PLAINTIFF

v.

ROBERT P. AGUILAR, DEFENDANT

VIOLATIONS:

18 U.S.C. § 371—Conspiracy to defraud the United States; 18 U.S.C. § 1503—Corrupt endeavor to influence due administration of justice; 18 U.S.C. § 2232(c)—Giving notice of electronic surveillance with intent to impede interception

INDICTMENT

THE GRAND JURY CHARGES THAT:

INTRODUCTION

1. Since on or about June 18, 1980, defendant ROBERT P. AGUILAR has been a United States District Judge for the Northern District of California.

2. Beginning in July 1987, and at subsequent times relevant to this indictment, defendant MICHAEL RUDY THAM had a motion, brought [2] pursuant to Section 2255 of Title 28, United States Code, and Rule 33 of the Federal Rules of Criminal Procedure, pending before the United States District Court for the Northern District of California in case No. Cr. 79-0349 (hereinafter referred to as the § 2255 matter). By this motion, defendant THAM sought to overturn his 1980 conviction in the Northern District of California for embezzling union funds and making false entries in union records, in violation of Title 29, United States Code, Sections 439(c) and 501(c). Defendant THAM expected to gain reinstatement to a position as an official in the Teamsters Union and to gain at least $200,000.00 if his conviction were overturned.

COUNT ONE

The conspiracy and its objects

1. Paragraphs one and two of the introduction to this indictment are incorporated herein as though set forth in full.

2. From in or about the spring of 1987, the exact date being unknown to the grand jury, until on or about May 4, 1988, in the Northern District of California, defendants,

ROBERT P. AGUILAR
ABE CHAPMAN
MICHAEL RUDY THAM

and others known to the grand jury, did unlawfully, willfully, and knowingly combine, confederate, and agree among themselves:

A. to defraud the United States of its governmental functions and rights:

a) by impeding, impairing, defeating, and [3] obstructing the function and right of the United States De-

partment of Justice and the Federal Bureau of Investigation (FBI) to conduct criminal investigations free from corrupt, disloyal, and dishonest disclosures of law enforcement information, revealed by defendant AGUILAR to warn the co-conspirators of physical and electronic surveillance being conducted by the Federal Bureau of Investigation.

b) by impeding, impairing, defeating, and obstructing the function and right of the United States District Court for the Northern District of California to exercise the judicial power and to have the business of the court conducted honestly, impartially, and with integrity, free from improper and undue influence, favoritism, bias, dishonesty, corrupt approaches to judges of the court, and the improper disclosure of confidential information.

c) by depriving the United States and the United States District Court for the Northern District of California of the dutiful, faithful, conscientious, loyal, honest, and impartial service of the defendant AGUILAR as a judge of the United States District Court for the Northern District of California.

B. to commit an offense against the United States: that is, to corruptly endeavor to influence, obstruct, and impede the due administration of justice, in violation of Section 1503 of Title 18, United States Code, by making use of defendant AGUILAR's access to and influence with United States District Judge Stanley [4] A. Weigel to obtain for defendant MICHAEL RUDY THAM an evidentiary hearing in THAM's § 2255 matter, which was pending before Judge Weigel.

Manner and means of the conspiracy

3. It was a part of the conspiracy that defendant AGUILAR would disclose to the co-conspirators law enforcement information affecting the interests of the co-conspirators. This included information that an agent of

the Federal Bureau of Investigation was conducting physical surveillance of defendant CHAPMAN, and also included information concerning court-ordered electronic surveillance of defendant CHAPMAN.

4. It was further a part of the conspiracy that the conspirators would conceal the true nature of their dealings with each other by several means, including using code words and aliases, communicating with one another by using pay telephones and other clandestine means, and warning each other of law enforcement surveillance.

5. It was further a part of the conspiracy that defendants THAM and CHAPMAN would seek and receive advice and guidance from defendant AGUILAR concerning the matter THAM had pending before the United States District Court for the Northern District of California, in order to increase defendant THAM's chances of prevailing. This advice and guidance was based on defendant AGUILAR's review of legal papers filed and proposed to be filed before the court and on defendant AGUILAR's access to and influence [5] with Judge Weigel.

6. It was further a part of the conspiracy that defendants THAM and CHAPMAN would offer to find and would find employment for defendant AGUILAR's brother, Luis "Lou" Aguilar, and would inform defendant AGUILAR that they had done so.

7. It was further a part of the conspiracy that defendant AGUILAR would approach Judge Weigel, the judge handling the § 2255 matter, and endeavor to use defendant AGUILAR's access to and influence with Judge Weigel to help defendant THAM obtain an evidentiary hearing, and thereby to increase defendant THAM's chances of winning the § 2255 matter.

Overt Acts

8. The grand jury charges that in furtherance of the aforesaid conspiracy and to accomplish the objects thereof, the defendants did commit the following overt acts:

(1) Between on or about July 21, 1987, and October 2, 1987, the exact date being unknown to the grand jury, defendants CHAPMAN and AGUILAR met at defendant AGUILAR's residence in Campbell, California, with Edward Solomon and Linda Offner, the attorneys representing defendant THAM in the § 2255 matter. At the meeting, defendant AGUILAR advised Solomon and Offner to seek an evidentiary hearing in order to bring the matter to the attention of the judge handling the case, Judge Stanley A. Weigel.

(2) In or about August 1987, the exact date being unknown to the grand jury, defendant AGUILAR provided defendant CHAPMAN with [6] information, which defendant AGUILAR had learned from another judge, concerning court-ordered electronic surveillance involving defendant CHAPMAN.

(3) On or about September 15, 1987, defendant AGUILAR informed Solomon that he had spoken to Judge Weigel about the § 2255 matter.

(4) On or about October 1, 1987, after Judge Weigel had dismissed THAM's § 2255 motion on technical grounds, defendant CHAPMAN told defendant THAM that he would talk to defendant AGUILAR to find out what had gone wrong.

(5) On or about October 22, 1987, defendant AGUILAR advised Solomon on how to proceed in the § 2255 matter, and, the same day, Solomon filed a motion for reconsideration of the ruling dismissing the matter.

(6) On or about October 23-24, 1987, defendants THAM and CHAPMAN arranged to deliver legal papers to defendant AGUILAR.

(7) On or about October 26, 1987, defendants THAM and CHAPMAN instructed Solomon to call defendant AGUILAR in Colorado.

(8) On or about October 30, 1987, the day after Judge Weigel granted defendant THAM's motion for reconsideration, defendant THAM told defendant CHAPMAN that he would handle getting a job for defendant AGUILAR's brother, Lou Aguilar.

(9) On or about November 17, 1987, defendant THAM called Gerald Carbone, the Recording Secretary for Teamsters Local #853, and asked him to help get a job for Lou Aguilar. Defendant THAM told Carbone that Lou Aguilar's brother was a federal judge who had [7] been helpful to a lot of people.

(10) On a date in or about November or December 1987, but not after December 16, 1987, the exact date being unknown to the grand jury, defendant AGUILAR spoke to Judge Weigel about the § 2255 matter.

(11) On or about December 16, 1987, defendant AGUILAR reported to Solomon that he had talked to Judge Weigel concerning the § 2255 matter.

(12) On or about December 21, 1987, defendant CHAPMAN told defendant THAM that defendant AGUILAR had said that when defendant THAM won he would get back his job and all the money he had lost.

(13) On or about January 4, 1988, defendant CHAPMAN reported to defendant THAM that defendant AGUILAR had helped Judge Weigel make arrangements for a trip to Mexico and had asked Judge Weigel to take care of defendant THAM.

(14) On or about January 12 or January 19, 1988, the exact date being unknown to the grand jury, defendant AGUILAR spoke to Judge Weigel about the § 2255 matter.

(15) On or about January 21, 1988, defendant AGUILAR reported to Solomon that he had mentioned the § 2255 matter briefly to Judge Weigel and that Judge Weigel did not know what was pending on it. Defendant AGUILAR advised Solomon to file a request to set a hearing in the matter, because defendant AGUILAR had done as much as he could do without causing Judge Weigel to become angry.

(16) On or about January 24, 1988, defendant CHAPMAN reported [8] to defendant AGUILAR that Lou Aguilar was working, and said that "next month we'll put him" in another job. In the same conversation, defendant AGUILAR told defendant CHAPMAN that he had advised Solomon to request that a hearing be set in the § 2255 matter.

(17) On or about January 29, 1988, defendant THAM instructed defendant CHAPMAN to tell defendant AGUILAR that defendant THAM wanted to win the § 2255 matter "as quick as possible now."

(18) On or about February 6, 1988, defendant CHAPMAN met defendant AGUILAR at defendant AGUILAR's residence. A few minutes after defendant CHAPMAN left defendant AGUILAR's residence, defendant AGUILAR instructed his nephew to visit defendant CHAPMAN immediately and inform him that defendant CHAPMAN was being followed by the FBI. Defendant AGUILAR also informed his nephew that defendant AGUILAR knew that defendant CHAPMAN's telephone was wiretapped because defendant AGUILAR had learned about the wiretap at work.

(19) On or about February 16, 1988, defendant CHAPMAN reported to defendant THAM that defendant AGUILAR had said he had discussed the § 2255 matter with Judge Weigel four or five times and that defendant CHAPMAN should forget it and not worry about it.

(20) On or about February 19, 1988, defendant CHAPMAN, using the alias "Dr. Green," left a message at defendant AGUILAR's chambers for defendant AGUILAR to call him.

(21) On or about March 1, 1988, defendant AGUILAR told Solomon [9] that defendant AGUILAR had seen the FBI following defendant CHAPMAN. Defendant AGUILAR said that he knew the person following defendant CHAPMAN to be "an FBI man."

(22) Later the same day, when Solomon reported to defendant THAM that defendant CHAPMAN was being followed by the FBI, defendant THAM said that he would stay away from defendant CHAPMAN.

(23) On or about March 2, 1988, defendant CHAPMAN, using the alias "Dr. Green," called defendant AGUILAR's chambers. Defendant AGUILAR said that he had spoken with Solomon and that Solomon would file a motion to have a hearing date set. In the same conversation, defendant CHAPMAN reported that Lou Aguilar would be at a better job after this thing was over. Defendant AGUILAR replied that he was glad to hear that.

(24) On or about March 4, 1988, defendant THAM cut short a telephone conversation with defendant CHAPMAN, saying that defendant CHAPMAN was hot.

(25) On or about March 16, 1988, defendant THAM told defendant CHAPMAN that his probation officer had received information that he was associating with convicted felons and that she was considering informing Judge Weigel about it. Defendant THAM then asked defendant CHAPMAN to "drop" this question to defendant AGUILAR.

(26) On or about March 18, 1988, defendant AGUILAR advised defendant CHAPMAN about defendant THAM's probation problem and about the § 2255 matter.

(27) On or about March 28, 1988, defendant CHAPMAN, using the [10] alias "Dr. Green," called defendant AGUILAR at his chambers. Defendant CHAPMAN informed defendant AGUILAR that they were trying to put his brother in another job. In the same conversation, defendant CHAPMAN told defendant AGUILAR that getting the hearing on the § 2255 matter was "so important." Defendant AGUILAR said that he would "see why they don't set it" for hearing.

(28) On the same date, shortly after speaking with defendant AGUILAR, defendant CHAPMAN reported to defendant THAM that defendant AGUILAR was going to find out why the hearing had not yet been set.

(29) On or about April 4, 1988, defendant CHAPMAN reported to defendant THAM that defendant AGUILAR appreciated what defendant THAM had done for his brother.

(30) On or about April 12, 1988, defendant AGUILAR told defendant CHAPMAN that he had not talked with the judge. Defendant AGUILAR said that he was going to be in San Francisco the following Tuesday and would "see if we can get a date set right away, to get it done one way or the other."

(31) On or about April 20, 1988, defendant AGUILAR told Solomon that he had spoken to Judge Weigel, and that Judge Weigel had said he would rule in due course.

(32) On or about May 4, 1988, after Judge Weigel had disqualified himself from the § 2255 matter, defendant THAM asked Solomon if defendant AGUILAR was going to "check into" the new judge assigned to the case.

[11] All in violation of Title 18, United States Code, Section 371.

COUNT FOUR

In or about August 1987, the exact date being unknown to the grand jury, in the Northern District of California, defendant,

ROBERT P. AGUILAR

while a United States District Judge, having knowledge that a Federal investigative officer had applied to the United States District Court for the Northern District of California for authorization to intercept wire communications of Abe Chapman, and in order to obstruct, impede, and prevent such interception, gave notice and attempted to give notice of the possible interception to Abe Chapman.

In violation of Title 18, United States Code, Section 2232(c).

COUNT SIX

On or about February 6, 1988, in the Northern District of California, defendant,

ROBERT P. AGUILAR

while a United States District Judge, having knowledge that a Federal investigative officer had applied to the United States District Court for the Northern District of California for authorization to intercept wire communications of Abe Chapman, and in order to obstruct, impede, and prevent such interception, gave notice and attempted to give notice of the possible interception to Abe Chapman.

In violation of Title 18, United States Code, Section 2232(c).

[12] **COUNT SEVEN**

1. At all times relevant to this count of the indictment, defendant AGUILAR was aware that a federal grand jury in the Northern District of California was investigating possible violations of federal criminal law by ROBERT P. AGUILAR, Abe Chapman, Michael Rudy Tham, and others.

2. On or about May 26, 1988, defendant

ROBERT P. AGUILAR

while a United States District Judge, did corruptly endeavor to influence, obstruct, and impede the aforementioned grand jury investigation, and thus the due administration of justice in the Northern District of California, by advising Edward Solomon to lie about Solomon's relationship with defendant ROBERT P. AGUILAR and about defendant ROBERT P. AGUILAR's activities on behalf of Michael Rudy Tham.

In violation of Title 18, United States Code, Section 1503.

COUNT EIGHT

1. At all times relevant to this count of the indictment, defendant AGUILAR was aware that a federal grand jury in the Northern District of California was investigating possible violations of federal criminal law by ROBERT P. AGUILAR, Abe Chapman, Michael Rudy Tham, and others.

2. On or about June 22, 1988, defendant

ROBERT P. AGUILAR

[13] while a United States District Judge, did corruptly endeavor to influence, obstruct, and impede the aforementioned grand jury investigation, and thus the due administration of justice in the Northern District of California, by making false and misleading statements to

Special Agents of the Federal Bureau of Investigation concerning defendant AGUILAR's assistance to Michael Rudy Tham and concerning defendant AGUILAR's assistance to Michael Rudy Tham and concerning defendant AGUILAR's knowledge and disclosure of information concerning court-ordered electronic surveillance of Abe Chapman.

In violation of Title 18, United States Code, Section 1503.

A TRUE BILL

Dated: June 13, 1989

_____

FOREPERSON

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. CR-89-365 LCB

UNITED STATES OF AMERICA, PLAINTIFF

v.

ROBERT P. AGUILAR, ABE CHAPMAN AND
MICHAEL RUDY THAM, DEFENDANTS

[Filed Jan. 22, 1990]

GOVERNMENT'S CORRECTED BILL OF PARTICULARS CONCERNING COUNTS FOUR AND SIX OF THE INDICTMENT

Count Four of the indictment charges that:

In or about August 1987, the exact date being unknown to the grand jury, in the Northern District of California, defendant, ROBERT P. AGUILAR while a United States District Judge, having knowledge that a Federal investigative officer had applied to the United States District Court for the Northern District of California for authorization to intercept wire communications of Abe Chapman, and in order to obstruct, impede, and prevent such interception, gave notice and attempted to give notice of the possible interception to Abe Chapman.

In violation of Title 18, United States Code, Section 2232(c).

BILL OF PARTICULARS:

(1) On April 20, 1987, the United States applied to the United States District Court for the Northern District of California for authorization to intercept telephone conversations of Abe Chapman, Michael Rudy Tham and others, over Tham's telephones. The wiretap concluded in May 1987, and, on July 15, 1987, the authorizing judge, Chief Judge Robert Peckham, signed an order postponing the service of inventories from the April wiretap for ninety days.

(2) On or about August 5, 1987, the Special Agent in Charge of the San Francisco F.B.I. office, Richard Held, told Chief Judge Peckham, in substance, that state investigators surveilling Chapman had observed Chapman in company with defendant Aguilar and a third man. Mr. Held told the Chief Judge, in substance, that defendant Aguilar was not a subject or a target of the Chapman investigation.

(3) On or about August 9, 1987, Chief Judge Peckham mentioned, in substance, to defendant Aguilar, as a word to the wise, that Chapman's name had come up in connection with a wiretap application.

(4) Very shortly after this conversation, defendant Aguilar asked his nephew, Steve Aguilar, in substance, to tell Chapman not to call defendant Aguilar, because Chapman's phone might be tapped.

Count Six of the indictment charges that:

On or about February 6, 1988, in the Northern District of California, defendant ROBERT P. AGUILAR while a United States District Judge, having knowledge that a Federal investigative officer had applied to the United States District Court for the Northern District of California for authorization to

intercept wire communications of Abe Chapman, and in order to obstruct, impede, and prevent such interception, gave notice and attempted to give notice of the possible interception to Abe Chapman.

In violation of Title 18, United States Code, Section 2232(c).

BILL OF PARTICULARS:

(1) On or about August 9, 1987, defendant Aguilar learned of Chapman's name in connection with a wiretap application.

(2) On July 15, 1987 and November 13, 1987, Chief Judge Peckham signed orders postponing the service of inventories from the April 1987 wiretap.

(3) On or about February 6, 1988, an F.B.I. surveillance team followed Chapman to defendant Aguilar's house in San Jose. As Chapman was leaving, defendant Aguilar noticed an F.B.I. agent observing the meeting.

(4) Minutes later, defendant Aguilar telephoned his nephew, Steve Aguilar, and asked him to come over right away.

(5) Defendant Aguilar asked Steve Aguilar, in substance, to tell Chapman that Chapman was being followed by the F.B.I., and again told Steve Aguilar, in substance, that Chapman's phone might be tapped.

(6) Steve Aguilar told Chapman, in substance, about the F.B.I. surveillance and that Chapman's phone might be tapped.

(7) Shortly after Steve Aguilar returned to his house, after telling Chapman, defendant Aguilar telephoned his nephew again. Defendant Aguilar asked Steve Aguilar to come over to defendant Aguilar's house. When Steve

Aguilar arrived, defendant Aguilar asked, in substance, if he had passed the information on to Chapman, and Steve Aguilar said he had.

Respectfully submitted,

/s/ Sara M. Lord

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. CR. 89-0365 LCB

UNITED STATES OF AMERICA, PLAINTIFF

v.

ROBERT P. AGUILAR, DEFENDANT

Transcript of Proceedings – August 14, 1990
VOLUME 10

* * * * *

Now, the second disclosure occurs on February 6th, 1988, the sequence of events there is well-known to you. Judge Aguilar makes the surveillance and he immediately calls his nephew to come over to the house.

He doesn't call Marilyn Aguilar, he says it's because he doesn't have the number, but he doesn't say to Steve Aguilar what's your mother's number, nor does he say to Steve Aguilar call your mother and relay this message. No, he asks Steve Aguilar to come over right away. It's very, very urgent, I can't talk over the phone, I need to get a message to your grandfather.

Now, at this point rule out the notion that the purpose of this call was to warn Abie Chapman about his driving. Think [1435] that one through. The claim is Abie Chapman almost caused an accident. Why would it be so important to get to Abie Chapman to tell him that he had almost caused an accident ten minutes earlier and, yeah, couldn't that information be relayed over the phone.

The whole point of that call was to have Steve Aguilar come over to Judge Aguilar's house to relay confidential information to Steve Aguilar and then to make sure that Steve Aguilar relayed the information in person to Abie Chapman. The whole point of that call was to make sure that the disclosure was absolutely surrepetitious.

Now, Steve Aguilar arrives and Judge Aguilar tells him "Abie Chapman is being followed by the FBI and I overheard as a fluke at work that his phones may be tapped."

Let's break that up into two disclosures: One, there's a disclosure that Abie Chapman is under physical surveillance by the Federal Bureau of Investigation. Two, there's the disclosure that he's under electronic surveillance.

Now, dealing with the physical disclosure. Judge Aguilar said it was the FBI and he meant to say it was the FBI. That's what he told Steve Aguilar, he said it was the FBI. He told Ed Solomon three weeks later it was the FBI and he told Ed Solomon on May 17th that it was the FBI, he also believed it was the FBI.

The only time that he vacillates on that and says it [1436] was a policeman is here in court where he's charged with interfering with the function of the Federal Bureau of Investigation to conduct investigations. The whole point is to suggest that if he thought it was just the police then maybe he couldn't have obstructed the FBI.

There's one other purpose by saying that it's the police, it allows him to tell you about a speech that he made that infuriated various police chiefs and law enforcement officers. The only person who talks about the police is Judge Aguilar.

Now, he told Steve Aguilar it was the FBI and he says to you that he thought it was because the FBI was after him. In 1983 Judge Aguilar ruled that the FBI had to turn over

their personal files of its agents.

The government appealed to the Ninth Circuit Court of Appeals. The Court of Appeals ruled that Judge Aguilar abused his discretion, that he was wrong. Judge Aguilar's decision did not stand.

MR. MELTZER: Your Honor, that's incorrect, that portion of the decision did stand.

MS. LORD: I don't believe that's true.

THE COURT: Whatever is in the evidence we can't go outside the evidence. The jury will remember what the testimony under oath was on that point, that's what the evidence is. Objection overruled.

[1437] MS. LORD: Also, in 1983 Judge Aguilar gave what the chief prosecution considered to be a lenient sentence in a criminal case. The chief prosecution objected, please read that letter, please. See what the chief prosecutor had to say and keep in mind that this was a sentencing. The prosecutor was an advocate in the context of that case. He had a position about what the appropriate sentence was and he expressed it.

On June 22nd Judge Aguilar tells FBI agents that it's all right for Judge Aguilar to write letters of recommendation for people who are going to be sentenced. Now, why can't the U.S. Attorney do the same thing?

But, at the same time that these two things are supposedly happening, the FBI is investigating a case where individuals made death threats against Judge Aguilar and the U.S. Attorney's office was prosecuting it.

But Judge Aguilar wants you to believe that in 1988, five years after the two incidents that he described when he saw someone outside his house, he leaped to the conclusion that the FBI was out to get him. And that all, after that rushed through his mind in the one minute between the time that Abie Chapman drove off and the time that call was placed to Steve Aguilar. He told Abie Chapman

that the FBI was following him to warn Abie Chapman.

Now, consider the disclosure of the electronic surveillance information and remember again that Judge Aguilar [1438] says, "Well, I told that to Steve Aguilar, but it wasn't true." You know that Judge Peckham told him. He says, "Well, I told Steve Aguilar about the wiretap because he wasn't taking me seriously about the FBI surveillance."

You heard Steve Aguilar testify. You know that Steve Aguilar came to his uncle's house immediately when he was asked. Ladies and gentlemen, Steve Aguilar took that information seriously. Judge Aguilar divulged both of those facts to Steve Aguilar so that Steve would convey them to Abie Chapman.

And once again ask yourselves, did he really think that when he said those things to Steve Aguilar that Steve Aguilar would not pass those facts onto Abie Chapman? Think it through.

What does he do next? Approximately an hour later he calls Steve Aguilar again, he calls him himself, asks Steve Aguilar to come over and they discuss whether Steve Aguilar delivered the message. And, as we know, Steve Aguilar did.

* * * * *

[1492] Now, a couple words about Count 6, that's the next wiretap warning, February the 6th of 1988. Now, Mr. Meltzer told you that this additional warning was silly and he gave you some pretty silly examples, but Judge Aguilar has testified on this stand that he's familiar with wiretaps and wiretaps expire after 30 days, as you know they may or may not be extended.

A simple answer is on February 6th, which is months after August, you know, he saw an FBI surveillance of Abie Chapman outside his house and he put two and two

together and concluded that the electronic surveillance had been extended and that's what this warning was all about.

* * * * *

[1514] With respect to the second item, Item B, the second item on your verdict slip, this charges a conspiracy to obstruct justice. And once again, members of the jury, the defendant is not charged in this count with obstructing justice, he's charged with conspiring with others to obstruct justice.

In order to understand that let me just briefly review [1515] with you the elements of obstruction of justice. This will come up in some remaining counts of the indictment because in Count 7 and 8 the defendant is charged with obstruction not conspiracy, but obstructing justice.

This second object of the conspiracy charges the defendant with the conspiracy to endeavor to corruptly influence, or obstruct, or impede a judicial proceeding in violation of Title 18, section 1503.

Now, Title 18 at 1503 states: "That whoever corruptly endeavors to influence, obstruct or impede the due administration of justice shall be guilty of an offense against the United States."

The elements, therefore, that have to be proven, that is the proof must satisfy you beyond a reasonable doubt unanimously first, that there was a pending judicial proceeding known to the defendant. And the conspiracy charged that pending judicial proceeding is a 2255 proceeding, that's the one we've heard before Judge Weigel. I instruct you as a matter of law that a 2255 petition that is filed in court is a judicial proceeding.

The second element that must be proven is that the defendant endeavored to influence or impede the due administration of justice. Keep in mind this is a conspiracy

charged. He's only charged with agreeing with others there be an endeavor made. Not, in fact, an endeavor was made with Judge [1517] Weigel.

This second element of an alleged conspiracy to endeavor to influence a judicial proceeding, an endeavor means any effort or any act to accomplish the purpose that this statute was designed to prevent and, that is, the due administration of justice.

The term due administration of justice means that the law expects and requires a free and fair opportunity for every judicial proceeding to go forward without outside corrupting influences.

The third element of obstruction of justice is that the endeavor, if one was made, must be done corruptly. An act is done corruptly if it's done voluntarily and intentionally to bring about either an unlawful result or a lawful result by some unlawful method, with a hope or expectation of either financial gain or other benefit to oneself or a benefit of another person. And the statute, members of the jury, as stated it's intended to reach every endeavor that would have that as its purpose if it's done corruptly.

Now, in this Count 1, that is this B Part of Count 1, the court will state to correctly endeavor to obstruct justice on the verdict slip, it's not necessary that the proof show that there was ever any actual endeavor to obstruct justice with respect to the matter before Judge Weigel. The defendant's only charged with a conspiracy with others to endeavor to obstruct [1518] justice in that regard.

* * * * *

[1521] THE COURT: All right. Members of the jury, I want to now turn to the remaining counts of the indictment. The next count you'll be picking up, as shown in your verdict slip, is Count 4. You'll see when you have the

indictment that's, as I mentioned, conspiracy takes up a lot of the pages, 10 pages and Count 4 and Count 6 are on page 11. Count 4 is brief, let me read what Count 4 says. You'll have it in the jury room.

In or about, I mentioned in or about means on or about, it's necessary to prove that the event took place at or about that time in order for the burden of prove to be satisfied, it says:

In or about August 1987, the exact date being unknown to the grand jury, in the Northern District of California, the defendant, Robert P. Aguilar, while a United States District Judge having knowledge that a federal investigative officer had applied to the United States District Court for authorization to intercept wire communications of Abe Chapman, and in order to obstruct, impede or prevent such interception gave notice and attempted to give notice of a possible interception to Abe Chapman, in violation of Title 18, United States Code Section Two Thousand Two Hundred Thirty Two, 2232 of Paragraph C.

Now, the statute involved here appears that at Title 18, Section 2232(c)(c) reads in pertinent part as follows:

"That whoever having knowledge that a federal investigative or law enforcement officer has been authorized or [1522] has applied for an authorization to intercept a wire, oral or electronic communication, in order to obstruct, impede or prevent such interception, gives notice or attempts to give notice of a possible interception to any persons, shall be guilty of an offense against the United States."

Now, that, too, members of the jury, has a number of elements that must be proven before the defendant can be found guilty. The first is that the defendant had knowledge that authorizations to conduct electronic surveillance of Abe Chapman had been applied for.

Knowledge of a fact, members of the jury, means that you're satisfied from the evidence that he knew it or knowledge of the existence of a particular circumstance may be satisfied by proof that the defendant was aware of a high probability of the existence of that circumstance. Unless you find from the evidence that the defendant actually believed that the circumstance did not exist.

So in order to determine whether or not the evidence has satisfied the element that the defendant had knowledge of an alleged—and that, of course, must be proven there was an application for electronic surveillance of Abe Chapman's conversations, you should determine from the evidence whether you believe that an application had been applied for and whether or not you believe that defendant was aware, actually knew or was aware of a high probability of that is existed. Or to the [1523] contrary whether you find it was his belief, in fact, that the application had not been applied for.

This second element of this violation in this section of the code is that, which must be proven, is that the defendant gave notice or attempted to give notice of that fact. That means, the application for an interception to Abe Chapman who was an interceptee in the application.

Well, in this regard, members of the jury, consider the evidence and you determine whether or not the evidence satisfies you, as I've stated, as must, that in order to convict, that is, it must be proven beyond a reasonable doubt, whether or not you believe the evidence shows that if the defendant knew that there was an application for an interception of Abe Chapman's conversations; whether or not the defendant gave notice. And to give notice simply means to actually give notice or to cause another to give notice to Abe Chapman.

This statute also in the indictment makes reference to it being a violation if there's an attempt to give notice. To at-

tempt an offense means willfully to take some substantial step in an effort to bring about or accomplish something that the law forbids to be done.

Now, a person may be guilty of an attempt for deliberately doing some act to try to give notice to Mr. Chapman, even though Mr. Chapman may never actually have received the notice of the possible interception. An attempt is [1524] more than mere planning or preparation, the evidence must show that the defendant took a substantial step to indicate an intent to commit the crime.

Now, the third element, members of the jury, is that the defendant had to act with a specific intent to obstruct, impede or prevent possible interceptions of conversations of the interceptee.

If the other elements are satisfied then you should take up the question of whether or not you believe it was the intent, by giving notice or attempting to give notice, to in some way impede or interfere with the interceptions that have been applied for.

Consider all the evidence and determine what the intent was if that notice or attempted notice was given. All the elements are satisfied it is not necessary that at the time the disclosures were made the interception was still going on. In other words, not necessary there there was a wire interception that was going on at the time the disclosure is made. What is required to be proved, that an application was made and that notice was given or attempted to be given in an effort to obstruct, impede or prevent the possible interceptions.

It's also not necessary that it be proven that Abe Chapman's own telephone was intercepted. It's the conversations that are intercepted and not the telephone that the statute reaches.

[1525] The statute provides again in pertinent part: "Whoever has knowledge of the federal investigative law

enforcement officer has been authorized or applied for authorization to intercept a wire oral or electronic communication in order to obstruct, impede or prevent such interception gives notice or attempts to give notice of the possible interception to any person, shall shall guilty of this offense."

In this instance it's charged that the defendant gave notice and attempted to give notice to Abe Chapman at or about this time of an application for wire interception.

The elements are the same, members of the jury, with respect to Count 6, Count 6 alleges in pertinent part as follows:

That on or about February 6th 1988, you recall Count 4 made reference to in or about August 1987, Count 6 says on or about February 6 1988 in the Northern District of California, United States District Judge having knowledge of a Federal Investigative Officer had applied to the United States District Court for the Northern District of California for authorization to intercept wire communication of Abe Chapman and in order to obstruct, impede or prevent such interception gave notice or attempted to give notice of a possible interception to Abe Chapman.

So the elements are the same. That is, the elements that I mentioned before must be satisfied that the defendant had [1526] knowledge that the authorization to conduct electronic surveillance of Abe Chapman had been applied for. The defendant gave notice or attempted to give notice to that fact to Abe Chapman who was an interceptee and the defendant acted with a specific intent to obstruct and impede or prevent possible interception of conversations.

Even though it may have been the same application in the evidence, if the notice was given on different dates would be a seperate violation. It's not necessary that a telephone be tapped, it's necessary that conversations be intercepted for the statue to be satisfied.

And in Count 6 as in Count 4 it's not necessary that at the time you may find a disclosure was made, it's not necessary that the interception be going on at that time. What is necessary that the evidence show an application had been made and the defendant knew of it and gave notice for the purpose I mentioned.

The evidence doesn't satisfy beyond a reasonable doubt as to those elements the defendant cannot be found guilty and should be found not guilty.

Count 7 and 8, members of the jury, have to do with C and D on your verdict slip. I paraphrased Count 7 as corruptly endeavor to obstruct justice as to Edward Solomon, 8 corruptly obstruct justice said statements to the FBI.

You'll remember, members of the jury, this is based [1527] upon the evidence that's been offered here in some of these tapes you've been listening to primarily. You heard those tapes, you can listen to them again. They've been addressed to you by counsel essentially, but let me just read pertinent parts of Count 7.

Same statutes involved in Count 7 and Count 8 and that is Title 18, Section 1503. You may remember when I spoke to you about the conspiracy, I spoke to you about an alleged conspiracy in Paragraph B of the indictment of Count 1, conspiracy to obstruct justice, and that had to do with—you'll read the indictment, had to do with the alleged attempt to influence Judge Weigel. That's alleged to be an obstruction of justice and Count 1 charges a conspiracy to do that.

This is the same statute, has nothing to do with Judge Weigel, the obstruction here in Count 7, I'm going to now read it to you, the same statute and be the same elements and I'll go over the same elements. For example, must be a judicial proceeding, I'll go over that.

Count 7 says: At all times relevant to this count of the indictment the defendant was aware that a federal grand

jury in the Northern District of California was investigating possible violation of federal law by Robert P. Aguilar, Abe Chapman, Michael Rudy Tham and others.

On or about May 26th 1988 defendant Robert P. Aguilar did corruptly endeavor to influence, obstruct and impede the [1528] aforementioned grand jury investigation and thus the administration of—due administration of justice in the Northern District of California by advising Edward Solomon to lie about Solomon's relationship with the defendant Robert P. Aguilar and about defendant Robert P. Aguilar's activity on behalf of Michael Rudy Tham. Now, in violation of Title 18, Section 1503.

Now, again, the obstruction of justice statute that I spoke of a little while ago, I'll cover it again, states in pertinent part as follows:

"Whoever corruptly influence, obstructs or impedes the due administration of justice, or endeavors to influence obstruct or impede the due administration of justice, shall be guilty of an offense against the United States."

These two counts do not charge a conspiracy to obstruct justice. These two counts charge obstruction of justice.

Now, the statute has a a number of elements that I mentioned before and I'll go over them again. The first element is that the proof must show, as I've described to you, an alleged endeavor to influence a judicial proceeding which was known to the defendant. So the first thing you have to determine is whether there was a grand jury proceeding ongoing, consider the evidence in that regard.

And you have to determine whether or not the defendant on or about this day knew that a grand jury proceeding was [1529] ongoing. And I remind you in determining whether the defendant had knowledge you should consider the evidence and decide whether or not you believe in fact he knew from just your perception of that evidence, or whether or not you believe you're satisfied

that there's proof that the defendant was aware of a high probability of the existence of that circumstance. Unless you conclude that the defendant actually believed that, in this case the grand jury did not, was not in being at that time.

So in determining there was a judicial proceeding, consider the evidence you've heard from the witnesses and secondly determine whether or not it was investigating possible violations of law by the defendant and determine whether you believe the defendant knew, as I've outlined to you, there must be knowledge of the existence of a judicial proceeding before a defendant can be convicted of this offense.

Now, the next element of obstruction of justice is that the evidence must show that there was an endeavor to influence the due administration of justice. Again, an endeavor means any effort or act to accomplish the purpose that the statute was designed to prevent.

Keep in mind it's not necessary even in this statute of obstruction of justice that the proof show that justice was actually obstructed, but must be shown is an endeavor to do so, an endeavor to obstruct justice.

[1530] Now, what we mean again by interfering or obstructing the due administration of justice, is the notion that due administration of justice contemplates and expects a free and fair opportunity for every judicial proceeding to go forward without outside corrupting influences.

Finally, so you should determine whether or not the proceeding existed, whether the defendant knew of it and whether there was any endeavor by the defendant as I defined that, to influence or impede the administration of justice as it relates to the allegations concerning Mr. Solomon.

And the final element is the defendant acted corruptly, and you may recall I told you for this statute to be satisfied by the proof, the act must be corruptly done. Which simply means it must be done voluntarily, must be done intentionally to bring about either an unlawful result or a lawful result by unlawful means, with the hope of or expectation of either financial gain or other benefit to one's self or benefit to another.

So consider the evidence, members of the jury, in regard to this Count 7, to determine whether the defendant endeavored corruptly to obstruct or impede the due administration of justice by trying to get Mr. Solomon to testify untruthfully about either Mr. Solomon's relationship with the defendant and/or about defendant's activity on behalf of Michael Rudy Tham.

[1531] The proof does not have to show that both of those efforts were undertaken or took place. That is, it's not necessary that the government prove the defendant advised Solomon to lie twice. The government satisfies its burden of proof that the defendant advised Solomon to lie if it's proved beyond a reasonable doubt that the defendant advised Solomon to lie about either matter and advice was made for the purpose of obstructing the grand jury investigation.

So that count makes reference to two things: Mr. Solomon's relationship to Judge Aguilar and Judge Aguilar's alleged activity on behalf of Rudy Tham. So determine whether or not the evidence shows there was an endeavor with regard to either of those matters that can be said to violate that statute.

Count 8 is the same statute the same elements involved that count provides in pertinent part: On or about June 22, 1988, while said defendant was aware that a federal grand jury in the Northern District of California was investigating the possible violations of federal law by Robert

P. Aguilar, Abe Chapman and Michael Rudy Tham and others; and that on or about June 22, 1988 while U.S. District Judge, defendant, did corruptly endeavor to influence, obstruct and impede the aforementioned grand jury investigation, and thus the due administration of justice, by making false and misleading statements to special agents of the Federal Bureau of [1532] Investigation concerning defendant Aguilar's assistance to Michael Rudy Tham and concerning the defendant's knowledge and disclosure of information concerning court ordered electronic surveillance of Abe Chapman.

The elements are the same, members of the jury. Again, a grand jury proceeding is a judicial proceeding. You should first determine whether one existed at or about that time. You should then determine whether or not the defendant knew of it according to the standard that I mentioned, that he had knowledge that it was ongoing and know about it, and then you should determine whether any endeavor was made to interefere with or obstruct or impede that investigation and this is centered upon that meeting that day he had in Hawaii.

So consider all the evidence associated with that and determine whether the elements have been satisfied, including whether if they were satisfied an endeavor was made by the defendant in regard to existing grand jury investigation, whether or not it was corruptly done as I've defined the word corruptly.

Now, keep in mind, members of the jury, the agents of the Federal Bureau of Investigation they do not work for the grand jury, they're not employees of the grand jury, they're a separate agency and they investigate. You've heard—we had a witness, Mrs. Ellington I believe, describe a little bit about how the grand jury functions.
[1533] The thrust of this count is not that he lied to the FBI because that's not a violation of a particular law we're

concerned with here. We're concerned with whether or not, whatever was done whether FBI people or not, whether or not he as shown by the evidence by the standard I've mentioned to have known that a grand jury was ongoing and that he endeavored in those interviews, whether the FBI people or not, to in some way impede, interfere with or obstruct the functioning of that grand jury.

You'll have to determine whether or not you believe that was his intent and whether the purpose there was corrupt. That is, the very purpose to either bring about an unlawful result or lawful result by unlawful method with a hope of expectation of some financial gain or other benefit to one's self or to another.

* * * * *

[1544] MR. LUSKIN: Finally, your honor, as to Counts 4 and 6, we would ask that your honor instruct that the knowledge of the purpose of 2332(c) must come from confidential information, information derived from judges employment.

Mr. Keefer thought the knowledge came from the fact it was physical events and put two and two together. We would submit that's knowledge that the statute hasn't—mind you rather as a participant in the proceeding—

THE COURT: That's refused. Anything else?

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 90-10597, 91-10024

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE, CROSS-APPELLANT

v.

ROBERT P. AGUILAR,
DEFENDANT-APPELLANT, CROSS-APPELLEE

On Appeal From the United States District Court
For The Northern District of California
Docket No. CR 89-0365-LCB

BRIEF FOR THE UNITED STATES OF AMERICA

* * * * *

STATEMENT OF FACTS

1. *The Electronic Surveillance*

In 1986 and 1987, as part of a nationwide investigation of health care provider fraud, the San Francisco FBI was investigating, among other, a convicted former Teamster officer, Michael Rudy Tham, and a mobster then under indictment, Abe Chapman. RT 7:982-83; 1007-08. On April 20, 1987, the Government applied to then-Chief United States District Judge for the Northern District of California Robert Peckham for authorization to conduct electronic surveillance of Tham's business telephones, and named Chapman as an interceptee of the wiretap. GX

18A-C; RT 7:917-18. The wiretap expired on May 20, 1987, and was not immediately renewed.

Beginning on July 15, 1987, Judge Peckham signed a series of orders postponing the service of inventories and maintaining the secrecy of the wiretap through April 25, 1989. GX 20A-N; RT 7:918-19. By July 1987, the FBI had prepared an affidavit, and intended to seek authorization for a follow-up wiretap on all of Tham's phones, again including Chapman as a named interceptee. GX 25; RT 7:1009.

Against this background, on July 9, 1987, California Department of Justice state agents surveilling Chapman in connection with a separate investigation observed him enter the Federal Building in San Jose. RT 4:738. The state agents asked the FBI for assistance, and the state and federal agents together saw Chapman leave the building with Judge Aguilar and another man. RT 4:738-39; 7:964-65.

On August 5, 1987, concerned that Chapman's appearance with Judge Aguilar might be a threat to the security of the court, the Special Agent in Charge of the San Francisco FBI Office, Richard Held, informed Judge Peckham that Abe Chapman had been seen meeting with Judge Aguilar. RT 7:920, 986, 993, 995, 1010-11. On August 9, 1987, in a gentle effort to warn Judge Aguilar about Chapman's character and to prevent any appearance of impropriety that might reflect on the court. Judge Peckham told Judge Aguilar that Chapman's name had come up in a wiretap application, that Judge Peckham had once prosecuted Chapman in a drug case, and that Chapman was apparently still engaged in criminal activity. RT 7:921, 942.

On September 10, 1987, the Government re-applied for authorization to conduct electronic surveillance of Tham's telephones, and named Chapman as an interceptee. The

surveillance terminated on October 12, 1987. On October 21, 1987, the Government applied to extend the authorization to wiretap Tham's telephones, and the surveillance was resumed on that date. Thereafter, the electronic surveillance of Tham's telephones was continuously extended through May 8, 1988. GX 1B.

In addition to the electronic surveillance of Tham's telephones, on December 12, 1987, the Government applied for and obtained authorization to conduct microphone surveillance of Tham's office, again naming Chapman as an interceptee. This surveillance was also regularly extended through May 8, 1988. GX 1B.

On January 13, 1988, the Government applied for authorization to conduct electronic surveillance of Judge Aguilar's telephones and those of Tham's attorney, Edward Solomon. Chapman continued to be named as an interceptee. Surveillance of Solomon's phones ended in April 1988, while the surveillance of Judge Aguilar's phones was extended through May 8, 1988. GX 1B.

2. *Judge Arguilar Warns Chapman of the Wiretap*

On February 6, 1988, FBI Special Agent Thomas Purcell observed Chapman visiting Judge Aguilar at the judge's home. RT 5:801-03. When Judge Aguilar came out with Chapman, he observed Agent Purcell conducting the surveillance, and watched closely until the agent left. RT 5:803.

As soon as he entered his house, Judge Aguilar telephoned his nephew Steve Aguilar, and asked him to come to the house immediately because the judge needed to get a message to Chapman. N-504. When Steve Aguilar arrived, Judge Aguilar told him that Chapman was being followed by an FBI agent, and that he had overheard as a fluke at work that Chapman was being wiretapped. RT

5:825. At his uncle's direction, Steve Aguilar reported to Chapman that Judge Aguilar had said that Chapman was being followed by an FBI agent and that he was being wiretapped. RT 5:825-26. Shortly after Steve Aguilar returned to his own house, Judge Aguilar called him again, but said it would be better if they spoke at the judge's house. N-228. Returning to the judge's house, Steve Aguilar told his uncle that he had relayed the information to Chapman. RT 5:827-28.

Supreme Court of the United States

No. 94-270

UNITED STATES, PETITIONER

v.

ROBERT P. AGUILAR

ORDER ALLOWING CERTIORARI. Filed November 28, 1994.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

November 28, 1994

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No. 94-270

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT P. AGUILAR

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether an individual who endeavors to obstruct a grand jury proceeding by making false and misleading statements to prospective witnesses may be prosecuted for obstruction of justice, within the meaning of 18 U.S.C. 1503.

2. Whether an individual who knows of an application for authorization to intercept telephone conversations and who discloses its existence to a target in order to obstruct the interception of the target's conversations may be found guilty of violating 18 U.S.C. 2232(c), regardless of whether the authorization had expired by the time the disclosure was made.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-28a) is reported at 21 F.3d 1475. The opinion of the panel of the court of appeals (Pet. App. 29a-113a), which was subsequently vacated, is reported at 994 F.2d 609.

JURISDICTION

The judgment of the en banc court of appeals was entered on April 19, 1994. On July 11, 1994, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including August 17, 1994, and the petition was filed on August 11, 1994. On November 28, 1994, the Court granted the petition. J.A. 132. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 18 U.S.C. 1503 provides:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

2. 18 U.S.C. 2232(c) provides, in relevant part:

> Whoever, having knowledge that a Federal investigative or law enforcement officer has been authorized or has applied for authorization under chapter 119 [of Title 18] to intercept a wire, oral, or electronic communication, in order to obstruct, impede, or prevent such interception, gives notice or attempts to give notice of the possible interception to any person shall be fined under this title or imprisoned not more than five years, or both.

STATEMENT

This case arises from the prosecution of respondent United States District Judge Robert Aguilar of the Northern District of California. He was convicted after a jury trial on two counts of a multi-count indictment. One count charged respondent with obstruction of justice, in violation of 18 U.S.C. 1503. The other count charged respondent with disclosing a wiretap with the intent of obstructing or impeding it, in violation of 18 U.S.C. 2232(c). The en banc Ninth Circuit reversed the convictions on both counts. Pet. App. 1a-28a.

1. In 1986 and 1987, as part of a nationwide investigation of health care provider fraud, the San Francisco office of the Federal Bureau of Investigation (FBI) was investigating Michael Rudy Tham, a convicted former Teamster official, and Abe Chapman, an individual with longstanding criminal ties who was then under indictment. Pet. App. 3a, 5a, 6a; 7 Tr. 983, 1008. Chapman had a distant family connection with respondent; Chapman's wife's daughter had at one time been married to respondent's brother. Pet. App. 3a. On April 12, 1987, the government applied to then-Chief Judge Peckham of the United States District Court for the Northern District of California for authorization to conduct electronic surveillance of Tham's business telephones, pursuant to 18 U.S.C. 2516. The application named Chapman as an individual whose communications were to be intercepted. See 18 U.S.C. 2518(1)(b). By statute, the wiretap could run for no more than 30 days unless extended, see 18 U.S.C. 2518(5), and it expired on May 20, 1987. Pet. App. 5a. Beginning on July 15, 1987, however, Judge Peckham signed a series of orders postponing the service of

notices of the wiretap on the interceptees and maintaining the secrecy of the wiretap through April 25, 1989. 7 Tr. 918-919.

On July 9, 1987, law enforcement agents saw respondent leave the federal courthouse with Chapman. Pet. App. 3a, 5a-6a; 7 Tr. 964. On August 5, the FBI advised Judge Peckham that Chapman and respondent had been seen together. Pet. App. 6a. As Judge Peckham later testified at trial, he warned respondent four days later at an ABA reception "that in the course of a wiretap application that the name Abie Chapman had come up," that Judge Peckham had prosecuted Chapman "in a notorious narcotic case" in 1951, and that Chapman "had been a member of a sinister East Coast criminal organization and that he was convicted and sentenced to a substantial term." 7 Tr. 921. Judge Peckham testified that he spoke to respondent because he was "concerned that * * * associating with a notorious felon would create an appearance of impropriety." 7 Tr. 922. Judge Peckham "feared that Chapman might be going to use the judge's prestige of his office in the furtherance of Chapman's interest." *Ibid.*

Tham wanted to have his prior conviction for embezzlement and making false entries in union records overturned so that he could resume his union activities. After consulting with Chapman and attorney Edward Solomon, who had been a law school classmate of respondent, Tham filed a motion under 28 U.S.C. 2255 in mid-July 1987, seeking to vacate his prior conviction. Tham, Solomon, and Chapman hoped to use Chapman's and Solomon's ties to respondent to obtain help and advice from respondent with regard to the Section 2255 motion. Chapman and Solomon, who hoped to have respondent influence Judge Weigel, met with respondent and called him periodically with regard to the Section 2255 motion. Respondent checked on the scheduling of the Section 2255 motion, and asked Judge Weigel if a hearing had been set. Pet. App. 3a-4a. In a taped conversation, respondent acknowledged that he "did more than that" in connection with the case, although he stated that "[w]hat I did I did on my own." J.A. 12.

Meanwhile, the wiretap on Tham's telephones began again on September 11, 1987. Pet. App. 5a. On October 12, 1987, the wiretap once again expired, but it was reinstituted on October 22, 1987, and subsequently extended through May 8, 1988, when it finally expired. Pet. App. 5a. By October 1987, the wiretap was directed in part at investigating the apparent improper attempt by Tham and others to influence Judge Weigel, and Chapman continued to be named as an interceptee. Pet. App. 5a; Gov't Exh. 1B. On January 13, 1988, the FBI obtained authorization to expand its electronic surveillance to respondent's telephone. Gov't Exh. 1B.

The charge that respondent disclosed wiretap information arose out of the events of February 6, 1988. On that date, Chapman visited respondent at his house. As Chapman was leaving, respondent noticed a surveillance unit on the street in front of his house. Pet. App. 7a. Respondent immediately called his nephew, Steve Aguilar, and asked him to come to his house "right now, it's very, very urgent." Tape N-504. Respondent stated that "[i]t'll only take a minute, but it's very important you come here please." *Ibid.* He also told Steve that "I need to get a message to [Chapman], who was just here a minute ago. * * * But I can't talk over the phone." *Ibid.* Steve testified at trial that, upon his arrival at re-

spondent's house, respondent told him that "he recognized a car taking off following Abie [Chapman] and he recognized the driver as an FBI agent." 5 Tr. 824. Respondent also told Steve that "he had overheard at work about the possibility of Abie's phone being wiretapped." 5 Tr. 825. Steve drove to Chapman's house and informed Chapman of those facts. *Ibid.* Later that day, respondent again called Steve and asked him to come to his house. When Steve arrived, respondent asked Steve if he had seen Chapman. Steve assured respondent that he had given respondent's message to Chapman. 5 Tr. 826-827. Respondent explained to Steve that he called Steve over, rather than talking to him on the telephone, because he "didn't really know what phones were tapped." 5 Tr. 828.

Thereafter, Chapman used an alias ("Dr. Green") when he called respondent. See, *e.g.*, Tape O-1449, O-2022, O-3092. On February 29, 1988, Chapman told Tham that someone "very big" had told him that his telephone was tapped. Tape M-1189. Respondent, Chapman, Tham, and Solomon continued to discuss Tham's Section 2255 motion. In conversations with Chapman ("Dr. Green"), respondent discussed Solomon's representation of Tham. On April 20, for example, Chapman called respondent, who requested that Chapman "ask * * * Solomon to call me today." Tape O-6238. Chapman relayed the message to Tham. Tape H-6276. Using an agreed-upon code, Tham gave the message to Solomon. Tape H-6289, H-6299. As Solomon later reported back to Tham, when he called respondent, respondent dictated the language for a motion requesting a hearing on Tham's Section 2255 motion and told Solomon to file it. Tape J-4494.

By April 1988, Judge Weigel became aware of the FBI investigation in this case. On April 23, 1988, Judge Weigel recused himself from Tham's case. 9 Tr. 1236; Gov't Exh. 16. As he explained at trial, he did so because, if he denied Tham's motion, "[Tham's] lawyers could have claimed I was influenced by the FBI and their investigation." 9 Tr. 1245. On the other hand, he believed that if he granted Tham's motion, "the claim could have been made that I was influenced by Judge Aguilar, which I was not." *Ibid.*

On May 17, 1988, respondent and Solomon met for lunch. Solomon was cooperating with the government by this time and was secretly recording the conversation. J.A. 5-42. During lunch, respondent said that he "knew" the FBI was wiretapping Chapman because Judge Peckham had told him. J.A. 7. Respondent made quite clear that, in his view, Chapman's telephone was "definitely tapped." J.A. 21. Respondent admitted that he "told [his] nephew" about the tap of Chapman's telephone and that he had said to the nephew "I want you to tell him not over the phone," but to "get to his house and tell him." *Ibid.* Respondent also stated that

> once I found out that they were tapping the guy's phone the first thing I ask him, where are you calling me from? The pay phone. See I can hear the traffic. It's okay. What do you want? I wouldn't talk to him any other time. One time he called me I said where you calling me from? Marilyn's [respondent's former sister-in-law's] house. I said well I'm busy right now you'll have to call me some other time.

J.A. 27. Respondent also told Solomon to tell the authorities that "I [respondent] had nothing to do

with you regarding this case," J.A. 13, and that, if Solomon needed to call respondent at his chambers, he should "just say on, over the phone just say to me god I ran into some of our . . . our classmates" and "we oughta have lunch together." J.A. 40. Finally, respondent told Solomon that, if asked concerning his contact with Solomon, he was going to claim Solomon asked for advice about a "wrongful discharge" case, a subject that the two had in fact discussed many months before. J.A. 32. At the end of the lunch, respondent stated, "As far as I'm concerned we discussed a wrongful termination case." J.A. 42.

On May 26, 1988, respondent and Solomon met again for lunch, and Solomon once again secretly taped their conversation. J.A. 43-63. Solomon told respondent that FBI agents had interviewed him and informed him that "there's a grand jury goin' on now," that they had "subpoenaed [Solomon's] toll calls," and that Solomon would be subpoenaed to appear as a witness. J.A. 47. During the conversation, respondent stated that "if they subpoena me I may have a problem. A real problem explaining my discussions with Judge Weigel. It depends on what Judge Weigel says." J.A. 51. When Solomon told respondent that "[i]f anything develops I'll try to get in touch with you," respondent instructed, "Always call me by pay phone." J.A. 62.

The obstruction of justice count arises from a secretly recorded interview with respondent conducted on June 22, 1988, by Agent Carlon and another agent of the FBI. J.A. 64-95. The two agents visited respondent and informed respondent that there had been an allegation that, at Chapman's request, respondent had "attempted to intervene" in Tham's Section 2255 motion. J.A. 68.

Respondent made a number of false statements to the agents. For example, respondent stated that he had found out "recently" that Solomon was Tham's lawyer. J.A. 73. He stated that he "simply didn't discuss" the Tham case with Solomon, J.A. 76, even when the two had had lunch together. J.A. 74. See also J.A. 81 ("I never discussed it with Solomon"). He said that Solomon had asked him "how to proceed on a um wrongful termination or employment discrimination" case. J.A. 78.

Agent Carlon informed respondent that Chapman had been observed leaving his house to make calls from a pay telephone and then immediately returning home. Carlon stated his view that Chapman was acting like those who "suspect perhaps that their phones are tapped." J.A. 83. Respondent replied, "Well he can't have learned that from me because I don't . . . I don't know anything about that." *Ibid.* Respondent also denied that he had "ever f[ou]nd out or learn[ed] of any wire tap order on Abe Chapman." J.A. 84. See also J.A. 86. At the conclusion of the interview, respondent returned to the subject of his conversations with Chapman and stated:

> As you can see my conversations with him aren't very long, you know, and my and my visits with him aren't very long. He'll call me and say well I saw your mother and father and they're fine goodbye.

J.A. 94. At that point, the transcript indicates "(laughter)," followed immediately by respondent's adding: "And that's it." *Ibid.*

Early in the interview, respondent asked whether he was "some kind of a target" of the investigation and stated that he "assume[d] from this * * * that

I very likely am if I've done anything wrong." J.A. 68. Agent Carlon responded, "Yeah." *Ibid.* Later, respondent asked again if he was "the target." J.A. 86. Agent Carlon stated that "certainly some of this evidence is pointing in your direction and I'd have to say yes * * * there is a Grand Jury meeting" and that "some evidence will be heard I'm . . . I'm sure on this issue." *Ibid.* Respondent again said that he was "concerned" that a grand jury would meet "to determine whether or not they should return some indictment * * * against me for obstructing justice." J.A. 88.

2. On June 13, 1989, an eight-count indictment was returned against respondent, Tham, and Chapman. J.A. 96-107. Respondent was charged with conspiring to defraud the United States and to endeavor to obstruct justice, in violation of 18 U.S.C. 371; four counts of endeavoring to obstruct justice, in violation of 18 U.S.C. 1503; two counts of illegally disclosing a wiretap application, in violation of 18 U.S.C. 2232(c); and one count of violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c). On March 19, 1990, a jury acquitted respondent on one count of obstructing justice and deadlocked on the remaining counts against respondent and the other defendants. Pet. App. 4a, 30a.

The cases were severed, and the trial court granted the government's motion to dismiss the RICO count and one of the obstruction of justice counts against respondent. After a retrial, respondent was found guilty on one count of obstruction of justice and one count of illegally disclosing a wiretap application.

He was acquitted on the four remaining counts. Respondent was sentenced to concurrent sentences of six months' imprisonment and ordered to pay a $2,000 fine. See Pet. App. 4a, 30a, 106a. Meanwhile, Tham was convicted in a separate trial on one count of conspiracy and one count of obstruction of justice. See *United States* v. *Tham*, 960 F.2d 1391 (9th Cir. 1991). Chapman pleaded guilty to the conspiracy charge. See *id.* at 1393 n.1.

3. A divided panel of the Ninth Circuit affirmed in part and reversed in part. Pet. App. 29a-113a. The result hinged on the adequacy and effect of the knowledge instruction given to the jury, which was derived from the Model Penal Code's definition of knowledge. Judge Hall found that knowledge instruction correct, and would have affirmed the convictions on both counts. *Id.* at 31a-57a. Judge Hug believed that the knowledge instruction was incorrect, that the error was not harmless as to either count, and that both counts were defective for other reasons as well. He would therefore have reversed the convictions on both counts. *Id.* at 65a-101a. Judge O'Scannlain agreed with Judge Hug that the knowledge instruction was incorrect, but he viewed that error to be harmless as to the wiretap disclosure count. *Id.* at 102a-113a. Accordingly, the panel affirmed respondent's conviction on the wiretap disclosure count and reversed his conviction on the obstruction of justice count. *Id.* at 30a.

On the government's appeal of respondent's sentence, the panel remanded the case to the district court for resentencing, holding that the district court had failed to provide a reasoned explanation for its downward departure at sentencing. Pet. App. 30a-31a, 65a & n.1, 106a-112a.

4. On rehearing en banc, the Ninth Circuit reversed respondent's convictions on both counts. Pet. App. 1a-28a. The court did not reach the question whether the knowledge instruction was adequate or, if not, whether giving that instruction was harmless error.

With respect to the obstruction of justice count, the court observed that this prosecution was brought under the so-called "omnibus clause" of Section 1503, which makes it an offense to endeavor to "corruptly or by threats or force, or by any threatening letter or communication, * * * influence, obstruct, or impede[] the due administration of justice." 18 U.S.C. 1503. The court held that "the conduct charged in the indictment and found by the jury does not constitute a violation of" that clause. Pet. App. 16a. In the court's view, Congress had implicitly narrowed the broad language of the omnibus clause when it enacted and later amended another statute, 18 U.S.C. 1512. Pet. App. 19a-22a.

Specifically, the court observed that attempts to obstruct justice by influencing a witness were originally covered by Section 1503. Pet. App. 19a. In 1982, Congress had removed all express references to witnesses from Section 1503 when it enacted Section 1512, a new offense directed toward tampering with or influencing witnesses. Then, in 1988, Congress had amended Section 1512 in turn to make clear that it extended not only to coercion of witnesses, but also to non-coercive witness tampering, in which the defendant "corruptly persuades [a witness] * * * or attempts to do so." 18 U.S.C. 1512(b). The court acknowledged that the 1988 amendment did not alter Section 1503 and that it was enacted five months after the conduct at issue here. Pet. App. 21a. But

the court held that the 1988 amendment nonetheless "indicates that the conduct [claimed to be in violation of Section 1503] must involve a defendant who 'corruptly persuades . . . or attempts to [persuade]' a witness so as to influence his testimony." *Id.* at 22a. Since respondent was charged with obstructing the grand jury's investigation by making false and misleading statements to the FBI agents, and not by attempting to "corruptly persuade" them to testify falsely before the grand jury, the court concluded that no Section 1503 offense had been charged or proven in this case. *Id.* at 22a-24a. The court also found support for its conclusion in the rule of lenity, and in the Fifth Amendment concerns that would in its view result from "[c]onstruing section 1503 so broadly as to cover making false and misleading statements to FBI agents." *Id.* at 24a.

With respect to the wiretap disclosure count, the court held that the statute under which respondent was charged, 18 U.S.C. 2232(c), does not prohibit disclosure of wiretaps if the authorization of which the defendant had knowledge had expired by the time the defendant made the disclosure. In the court's view, a defendant could not have made a disclosure with the intent to interfere with "such interception"—*i.e.*, the interception contemplated in the wiretap application of which he had knowledge—if the interception had in fact expired before he had made the disclosure. Pet. App. 9a. Although the court believed that interference with possible interception could result from disclosure of a pending wiretap application or from disclosure of a still-active authorization, the court stated that "disclosure of an application that already has been denied, or whose authorization already has expired, cannot possibly interfere

with 'such interception.'" *Ibid.* In reaching that conclusion, the court added that its analysis of the statute was supported once again by the rule of lenity, *id.* at 9a-10a, and by the "substantial" impact on First Amendment interests that it believed could result from reading the statute to "bar[] disclosure of a wiretap application many months or years after the fact," *id.* at 11a.

Judge Fernandez, joined by Chief Judge Wallace, dissented from the court's reversal of the conviction on the wiretap disclosure count. Pet. App. 25a-28a. In Judge Fernandez's view, the plain language of the statute requires the government to prove only "that [respondent] knew that a wiretap had been applied for; that [respondent] intended to obstruct or impede the interception for which the application was designed to obtain authorization; and that [respondent] gave or attempted to give notice of the possible interception." *Id.* at 25a. Judge Fernandez explained that, because the evidence was more than adequate to prove those three elements, respondent's conviction under Section 2232(c) should be affirmed. In Judge Fernandez's view, so long as respondent "attempt[ed] to give a notice that would interfere with a wiretap," the fact that the wiretap of which he had notice had in fact expired was of no relevance. *Id.* at 26a.

SUMMARY OF ARGUMENT

The obstruction of justice offense defined by the omnibus clause of Section 1503 requires proof that there was a pending proceeding, that the defendant had knowledge of that proceeding, and that the defendant "corruptly * * * endeavor[ed] to influence, obstruct, or impede[] the due administration of justice" in that proceeding. The evidence at trial supported the jury's findings that, when respondent lied to the FBI agents, there was a pending grand jury proceeding and respondent knew of that proceeding. The evidence also was sufficient to show that respondent made a series of false statements to the FBI agents with the intent that they be reported to the grand jury and obstruct its investigation. Under the plain meaning of the omnibus clause of Section 1503, that conduct constituted a corrupt endeavor to obstruct justice. Accordingly, respondent was properly convicted of violating Section 1503.

The court of appeals erred in limiting the scope of the omnibus clause of Section 1503 on the ground that some of its protections are duplicated in 18 U.S.C. 1512, a statute protecting against witness tampering. Congress did not alter or amend the omnibus clause of Section 1503 when it enacted Section 1512 in 1982 or when it amended Section 1512 in 1988. Although the 1982 legislation did remove the express references to witnesses from other clauses in Section 1503, the effect of doing so was simply to remove specific language in Section 1503 that became redundant with the enactment of the new statute. And the 1988 legislation on which the court of appeals relied in construing the omnibus clause did not change Section 1503 at all. There is no reason to believe that Congress intended to alter the applicability of the omnibus clause of Section 1503 in accordance with its terms.

The court of appeals also erred in reversing respondent's conviction for wiretap disclosure under 18 U.S.C. 2232(c). The text of that statute requires proof that a defendant knew of an application to intercept conversations, intended to obstruct such interception, and attempted to give notice of the possible interception. There is no basis for the court of

appeals' holding that a defendant charged with violating Section 2232(c) may not be convicted if, unbeknownst to him, the interception of communications had not been authorized or the authorization had expired by the time he made his disclosure. The statutory language requires that the defendant intend to obstruct the interception; it does not require that the interception actually be occurring at the time of the disclosure. And the statute's requirement that the defendant give notice of the "possible interception" specifically recognizes that the government need not prove that the interception was actually occurring at the time of disclosure in order to obtain a conviction. If, after acquiring knowledge of the application to intercept communications, the defendant discloses the possibility of interception to others, he has violated the statute.

ARGUMENT

I. SECTION 1503 PROHIBITS MAKING FALSE AND MISLEADING STATEMENTS TO A POTENTIAL GRAND JURY WITNESS WITH THE INTENT OF OBSTRUCTING A GRAND JURY PROCEEDING

The "omnibus clause" of 18 U.S.C. 1503 makes it a crime to

> corruptly or by threats or force, or by any threatening letter or communication, influence[], obstruct[], or impede[], or endeavor[] to influence, obstruct, or impede, the due administration of justice.

A violation of that clause requires proof of the following elements: "(1) there must be a pending judicial proceeding; (2) the defendant must have knowledge or notice of the pending proceeding; and (3) the defendant must have acted corruptly with the specific intent to obstruct or impede the proceeding in its due

administration of justice." *United States* v. *Williams*, 874 F.2d 968, 977 (5th Cir. 1989); see also *United States* v. *Barfield*, 999 F.2d 1520 (11th Cir. 1993); *United States* v. *Biaggi*, 853 F.2d 89, 104 (2d Cir. 1988), cert. denied, 489 U.S. 1052 (1989). Among the proceedings protected by the statute are grand jury proceedings. See, *e.g.*, *United States* v. *Capo*, 791 F.2d 1054, 1070 (1986), vacated in part on other grounds on reh'g en banc, 817 F.2d 947 (2d Cir. 1987); *United States* v. *Simmons*, 591 F.2d 206, 208 (3d Cir. 1979); *United States* v. *Howard*, 569 F.2d 1331 (5th Cir.), cert. denied, 439 U.S. 834 (1978).

Viewed in the light most favorable to the government (as the verdicts of guilty require), the evidence in this case was ample to support the jury's finding that each of those elements was established. And, contrary to the court of appeals' holding, there is no basis for concluding that respondent did not obstruct justice because his misconduct involved making false statements to prospective grand jury witnesses.

A. The Evidence At Trial Established The Elements Of An Obstruction Of Justice

At the time of respondent's interview with the FBI agents on June 22, 1988, it is undisputed that there was a pending grand jury proceeding. There likewise can be no serious dispute that respondent had knowledge of the pending grand jury proceeding. In the tape-recorded conversation with Solomon on May 26, 1988—a month before the June 22 interview with the FBI agents on which the obstruction of justice count was based—Solomon informed respondent that "there's a grand jury goin' on now," that the FBI agents had informed him that they had "subpoenaed [Solomon's] toll calls," and that Solomon had been told he would be subpoenaed to appear as a witness.

J.A. 47. In that same conversation, respondent made clear that he understood that there was an ongoing grand jury investigation. He stated that

> if they subpoena me I may have a problem. A real problem explaining my discussions with Judge Weigel. It depends on what Judge Weigel says.

J.A. 51. In addition, at the beginning of the June 22 interview, the FBI agents informed respondent that he was a "target" of the investigation, J.A. 68, and respondent voiced concern to FBI Agent Carlon that he would be indicted "for obstructing justice," J.A. 88.

The evidence also supported the jury's conclusion that respondent acted "corruptly" with intent to "obstruct * * * the due administration of justice." 18 U.S.C. 1503. Respondent made false statements to FBI agents to minimize his involvement in a matter under grand jury investigation. He understood that his false statements would be provided to the grand jury, J.A. 86-88, and he made those statements with the intent to thwart the grand jury investigation.[1] The evidence showed that respondent's false statements—including his statement that he had no knowledge concerning the Chapman wire tap, his denial of knowledge concerning the relationship between Solomon and Tham, his statement that he did not discuss

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[1] The jury was specifically instructed that "[t]he thrust of this count is not that [respondent] lied to the FBI because that's not a violation of a particular law we're concerned with here." J.A. 126-127. Instead, the jury was instructed that the issue in this case was whether respondent "endeavored in those interviews, whether the FBI people or not, to in some way impede, interfere with or obstruct the functioning of that grand jury." J.A. 127.

the Tham case with Solomon, and his "cover story" that he and Solomon had simply talked about a wrongful termination case—were made with intent to mislead the grand jury and avoid testifying himself before the grand jury. See pp. 8-10, *supra*. That course of action constituted "corrupt" conduct under Section 1503, and the evidence showed that respondent performed it with the intent to obstruct a grand jury proceeding. See *United States* v. *Grubb*, 11 F.3d 426, 437 (4th Cir. 1993) (omnibus clause applies as long as the person who lied to a potential grand jury witness knew of the pending grand jury proceeding and "acted corruptly, that is with the intent to influence, obstruct, or impede that proceeding").

Courts have long recognized that closely analogous action to mislead the grand jury constitutes "corrupt" conduct, in violation of the omnibus clause of Section 1503. For example, the courts of appeals have uniformly recognized that obstruction of justice, in violation of the omnibus clause of Section 1503, may be committed by submitting false, forged, or altered documents to a grand jury. See, *e.g.*, *United States* v. *Rankin*, 870 F.2d 109, 112 (3d Cir. 1989); *United States* v. *Nelson*, 852 F.2d 706, 711-712 (3d Cir.), cert. denied, 488 U.S. 909 (1988); *United States* v. *McComb*, 744 F.2d 555, 559 (7th Cir. 1984); *United States* v. *Faudman*, 640 F.2d 20, 23 (6th Cir. 1981); *United States* v. *Walasek*, 527 F.2d 676, 679-680 (3d Cir. 1975). Obstruction of justice may also occur even when the false documents had not been subpoenaed by the grand jury and were not produced directly to the grand jury. For example, in *United States* v. *Shoup*, 608 F.2d 950, 959-963 (3d Cir. 1979), the defendant submitted a misleading report to the United States Attorney, knowing that the con-

tents of that report would be given to a sitting grand jury. *Id.* at 962. The Third Circuit affirmed the conviction, rejecting the defendant's argument that he could not have violated Section 1503 "because his report was requested by the United States Attorney, not the grand jury." *Ibid.* Because the defendant "knew that his report would likely be submitted to the grand jury and that he would be called to testify about his findings," *ibid.*, the court affirmed his conviction. And, as respondent has conceded, "the courts have routinely applied Section 1503 to false testimony to the grand jury." Br. in Opp. 19.[2]

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[2] The majority of the courts of appeals that have addressed the issue have so held. *E.g., United States* v. *Grubb*, 11 F.3d 426, 436-437 (4th Cir. 1993); *United States* v. *Williams*, 874 F.2d 968, 976-982 (5th Cir. 1989); *United States* v. *Gonzalez-Mares*, 752 F.2d 1485, 1491-1492 (9th Cir.), cert. denied, 473 U.S. 913 (1985); *United States* v. *Walasek*, 527 F.2d 676, 679-681 (3d Cir. 1975); *United States* v. *Cohn*, 452 F.2d 881, 883-884 (2d Cir. 1971), cert. denied, 405 U.S. 975 (1972); cf. *United States* v. *Lavelle*, 751 F.2d 1266, 1270 (D.C. Cir.) (defendant caused false and misleading statement to be submitted to agency, in violation of 18 U.S.C. 1505, the administrative counterpart to Section 1503), cert. denied, 474 U.S. 817 (1985). But see *United States* v. *Essex*, 407 F.2d 214 (6th Cir. 1969) (false statements in affidavit filed with district court not covered by omnibus clause of Section 1503).

The same principles have also been applied outside the grand jury context. See, *e.g., United States* v. *Barber*, 881 F.2d 345, 351 (7th Cir. 1989) (submission of forged letters to judge to influence sentencing of a defendant in another case), cert. denied, 495 U.S. 922 (1990); *United States* v. *Barfield*, 999 F.2d at 1522, 1524 (confidential informant provided false information to attorney for defendant, so that informant's own testimony would be impeached and defendant would not be convicted).

Respondent's conduct had the same effect as the submission of false or misleading documents or testimony to a grand jury. The only distinction between the misconduct in those cases and respondent's misconduct is that respondent's particular method of obstructing justice was to make false oral statements to FBI agents whom, he knew, would report those statements to the grand jury. Cf. *Costello* v. *United States*, 350 U.S. 359 (1956) (grand jury may return valid indictment based solely on hearsay testimony of FBI agents). But a defendant can as readily obstruct justice through the medium of false statements to witnesses as through the medium of false documents or testimony, and both of those forms of misconduct violate the omnibus clause of Section 1503. In short, the jury's finding that respondent made his false statements with the intent to obstruct the grand jury proceedings was supported by the evidence, and all of the elements of a violation of the omnibus clause of Section 1503 were made out.

B. The Omnibus Clause Of Section 1503 Applies To Misleading Statements Made To A Potential Grand Jury Witness

In overturning respondent's conviction for obstruction of justice, the court of appeals held that a special requirement exists under Section 1503 for cases involving potential grand jury witnesses. When the defendant is charged with endeavoring to obstruct a grand jury investigation by conduct directed toward a prospective grand jury witness, the court held, the conduct may be prosecuted under the omnibus clause of Section 1503 only if it can be characterized as an attempt to "corruptly persuade[]" the witness. Pet. App. 22a, 24a. In the court's view, although "threats, force, bribery, [or] extortion" would satisfy that re-

quirement, *id.* at 23, "making a false statement to a potential witness" would not, *id.* at 22a. Applying that requirement to the facts of this case, the court found that respondent's endeavor to obstruct the grand jury was not prohibited by the omnibus clause of Section 1503.

The court of appeals' conclusion is erroneous. In narrowing the scope of the omnibus clause with respect to witness-related misconduct, the court of appeals took note of the enactment in 1982 of a separate statute specifically addressed to witness tampering, 18 U.S.C. 1512, and then relied heavily on the amendment of Section 1512 in 1988. But the fact remains that, throughout the entire period, the portion of Section 1503 under which respondent was charged—the omnibus clause—remained unchanged. A natural reading of the text of that clause, both before and after the enactment of Section 1512, is that it prohibits all forms of conduct intended to mislead or obstruct the grand jury, including making false statements to potential witnesses with the intent that those statements be reported to a grand jury to thwart its investigation. Neither the 1982 enactment of Section 1512 nor the 1988 amendment to Section 1512 provides any basis for altering that conclusion.

1. *The scope of the omnibus clause was not affected by the 1982 amendments.* Section 1503 has always contained an omnibus clause; in addition, the original version of Section 1503 included two specific references to witnesses. The first primarily addressed efforts to influence or affect witnesses before their testimony, while the second primarily addressed injuring witnesses because of testimony already given. See 18 U.S.C. 1503 (1976) (quoted at Pet. App. 19a n.5). In 1982, Congress enacted the Victim and Witness Protection Act (VWPA), Pub. L. No. 97-291,

§ 4(a), 96 Stat. 1249-1253, which included provisions that duplicated the references to witnesses in Section 1503. To eliminate that duplication, Congress removed the specific references to witnesses from Section 1503. VWPA § 4(c), 96 Stat. 1253. Those deletions "left untouched" the omnibus clause of Section 1503 that is at issue here. *United States* v. *Moody*, 977 F.2d 1420, 1424 (11th Cir. 1992), cert. denied, 113 S. Ct. 1348 (1993).

a. Before the 1982 amendments, the introductory clause of Section 1503 proscribed endeavors "corruptly, or by threats or force, or by any threatening letter or communication, * * * to influence, intimidate, or impede any witness" in a federal court proceeding. 18 U.S.C. 1503 (1976). In 1982, the VWPA added a new provision to federal law, codified at 18 U.S.C. 1512, to address witness tampering. § 4(a), 96 Stat. 1249-1250. The new provision proscribed "knowingly us[ing] intimidation or physical force, or threaten-[ing] another person, or attempt[ing] to do so, or engag[ing] in misleading conduct" with intent to "influence * * * testimony" or "cause * * * any person to" withhold or alter testimony or documents, evade legal process, or communicate information regarding a federal crime to law enforcement officers or federal courts. 96 Stat. 1249.

Section 1512(b) differed in several specific respects from the clause of Section 1503 it replaced. For example, Section 1503 requires a pending federal proceeding. See, *e.g.*, *United States* v. *Williams*, 874 F.2d 968, 977 (5th Cir. 1989). The new provision, however, applied if the witness was anticipated to testify at an "official proceeding," which "need not be pending or about to be instituted at the time of the offense." 18 U.S.C. 1512(e)(1). The new Section 1512 also applied regardless of whether the defendant

knew that the official proceeding was federal in character, rather than state or local. 18 U.S.C. 1512(f). Section 1512 was narrower in one important respect. Perhaps unwittingly, Congress neglected to include in it a prohibition of attempts to bribe or otherwise corruptly persuade a witness. The significance of that omission became the subject of debate in the courts of appeals. See pp. 28-29, *infra*. But whether or not that omission was intended, the scope of the new provision at least substantially overlapped that of the clause it replaced in Section 1503. Accordingly, Congress in the VWPA deleted the specific proscription in Section 1503.

Before the enactment of the VWPA, Section 1503 also included one other specific reference to witnesses: it proscribed "injur[ing] any * * * witness * * * on account of his attending * * * or on account of his testifying" in a federal court. 18 U.S.C. 1503 (1976). At the same time as Congress enacted Section 1512, it also enacted 18 U.S.C. 1513. VWPA § 4(a), 96 Stat. 1250. That provision proscribes, *inter alia*, "caus[ing] bodily injury to another person * * * or threaten[ing] to do so, with intent to retaliate against any person for * * * the attendance of a witness * * * at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding." 18 U.S.C. 1513(a)(1). As with Section 1512, Section 1513 substantially overlapped the clause in Section 1503 that it replaced. Accordingly, Congress deleted the specific prohibition on injuring a witness from Section 1503.

b. Because the VWPA did not alter the scope of the omnibus clause of Section 1503, misconduct that violated that clause before 1982 continued to be within its scope after the 1982 enactments. The broad

prohibition against "corruptly * * * endeavor[ing] to influence, obstruct, or impede[] the due administration of justice" in the omnibus clause of Section 1503 remained the primary source of protection in federal law against obstruction of justice.

It is true that some conduct that violates Section 1503 would also violate the new prohibitions in Section 1512 or Section 1513. But it is a familiar principle in the criminal law that the same conduct may constitute an offense under two distinct statutes, and that in such a situation the government has the option to proceed under either one. See, *e.g.*, *United States* v. *Batchelder*, 442 U.S. 114, 123-126 (1979) (citing cases); *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 45-46 (1952). There is therefore no reason to assume that Congress made an implicit decision in the VWPA to eliminate any possible overlap between the omnibus clause of Section 1503 and the new provisions specifically directed at witness-related offenses. Indeed, even the court of appeals in this case did not adopt the theory that Sections 1503 and 1512 are mutually exclusive. Pet. App. 22a. And any holding that the two statutes are mutually exclusive would place prosecutors in the difficult position of having to elect in advance between two provisions that both apparently apply to a particular course of conduct, with the risk that a reviewing court might later conclude that the wrong statute had been invoked. Absent express language requiring that result, an intention to impose that burden on the criminal justice system should not be attributed to Congress.

Nor is there any reason to attribute an intent to Congress to remove *all* misconduct involving witnesses from the scope of Section 1503. Because Congress did not alter the text of the omnibus clause in any respect when it enacted the VWPA in 1982, the

conclusion that its substantive scope had changed would require a finding that the omnibus clause had been partially repealed by implication. As this Court has frequently explained, however, "[i]t is, of course, a cardinal principle of statutory construction that repeals by implication are not favored." *Randall* v. *Loftsgaarden*, 478 U.S. 647, 661 (1986); see, *e.g.*, *TVA* v. *Hill*, 437 U.S. 153, 189-190 (1978); *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974); *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936). When a new statute overlaps a portion of an older one, any legislative intent to repeal the earlier statute must be manifest in a "positive repugnancy between the provisions," *United States* v. *Borden Co.*, 308 U.S. 188, 199 (1939), for "it is not enough to show that the two statutes produce differing results when applied to the same factual situation." *United States* v. *Batchelder*, 442 U.S. at 122 (internal quotation marks omitted).

This case does not justify the invocation of either of the two exceptions to the rule severely disfavoring implied repeals—where there is "irreconcilable conflict" between the two statutes or where "the later act covers the whole situation of the earlier one and is clearly intended as a substitute." *Randall*, 478 U.S. at 661. There is no "conflict" or "positive repugnancy" between Section 1512 and the omnibus clause of Section 1503; both statutes define distinct criminal offenses, and, by refraining from committing both offenses, individuals may easily comply with both. Nor does Section 1512 cover "the whole situation" of the omnibus clause of Section 1503. Indeed, each statute prohibits substantial conduct that is not prohibited by the other.

The court of appeals indicated some reluctance to interpret the omnibus clause to prohibit a defendant

from making false statements to a potential grand jury witness, because that conduct "is very different from the other types of activities enumerated in section 1503." Pet. App. 23a. The omnibus clause, however, stands as an additional broad prohibition against obstructions of justice, and its purpose is to prohibit "more imaginative forms of criminal behavior * * * that defy enumeration." *United States* v. *Lester*, 749 F.2d 1288, 1294 (9th Cir. 1984). That role of the omnibus clause would be frustrated by limiting it to the specifically defined offenses in other clauses of Section 1503.

c. In *United States* v. *Noveck*, 273 U.S. 202 (1927), this Court rejected reasoning that closely paralleled the holding of the court of appeals here. The court of appeals in that case had held that a statute prohibiting anyone from "willfully attempt-[ing] in any manner to defeat or evade" an income tax impliedly repealed the general perjury statute, insofar as that statute applied to perjurious statements on a tax return. This Court reversed. The Court noted that there "was confessedly no express repeal" and that "it is clear that the two sections are not inconsistent." *Id.* at 206. Because the two offenses "are entirely distinct in point of law, even when they arise out of the same transaction or act," the Court found that the conclusion that "Congress must have intended" an implied repeal "does not follow." *Ibid.* The Court applied the same analysis in *Edwards* v. *United States*, 312 U.S. 473, 484 (1941), in rejecting a claim that the enactment of a prohibition against "the fraudulent sale of securities by mail" in the Securities Act of 1933 "repeals by implication the provisions of the old mail fraud statute in so far as they cover securities." See also *United*

States v. *Hirsch*, 100 U.S. 33, 35 (1879). That analysis leads to the same conclusion here.

All but one of the courts of appeals that have addressed the question have held that the enactment of Sections 1512 and 1513 did not alter the scope of the omnibus clause of Section 1503. For example, in *United States* v. *Kenny*, 973 F.2d 339 (4th Cir. 1992), the court affirmed a conviction under Section 1503 for a witness-related offense, even though the same conduct could have been prosecuted under Section 1512. The court held that "[t]he fact that § 1512 more specifically addresses improper conduct involving a witness does not preclude application of § 1503." 973 F.2d at 342. Other courts have also concluded that Section 1512 "is not the exclusive vehicle for prosecution for witness tampering," and that Section 1503 "is broad enough to cover such proscribed acts against witnesses." *United States* v. *Moody*, 977 F.2d at 1424. See *United States* v. *Rovetuso*, 768 F.2d 809, 824 (7th Cir. 1985) ("it is entirely proper to charge defendants under § 1503 with interfering with the due administration of justice when the conduct of the defendant relates to tampering with a witness"), cert. denied, 474 U.S. 1076 and 476 U.S. 1106 (1986); *United States* v. *Wesley*, 748 F.2d 962, 965 (5th Cir. 1984) (relying on "clear" terms of Section 1503 to affirm convictions under both Section 1503 and Section 1512 for intimidating a witness), cert. denied, 471 U.S. 1130 (1985); *United States* v. *Marrapese*, 826 F.2d 145, 148 (1st Cir.), cert. denied, 484 U.S. 944 (1987).

In *United States* v. *Risken*, 788 F.2d 1361, 1369 (8th Cir.), cert. denied, 479 U.S. 923 (1986), the court applied that principle in circumstances quite similar to this case, affirming convictions under both Section 1503 and Section 1512 because the defendant's "engaging in misleading conduct toward [a] grand jury witness * * * fall[s] within the terms of [both statutes]." Indeed, before this case, even the Ninth Circuit appeared to recognize that Congress's removal of the specific references to witnesses in Section 1503 did not preclude the prosecution of at least some witness-tampering offenses under the omnibus clause of Section 1503. See *United States* v. *Lester*, 749 F.2d at 1295-1296; see also *United States* v. *Kulczyk*, 931 F.2d 542, 546 & n.6 (9th Cir. 1991).[3]

d. The legislative history of the VWPA provides no support for truncating the scope of the omnibus clause of Section 1503. As reported by the Senate committee, the bill that evolved into the VWPA included an omnibus clause in Section 1512 that essentially tracked the omnibus clause of Section 1503 and that was not specifically tied to witness protection. S. Rep. No. 532, 97th Cong., 2d Sess. 3 (1982) (quoting bill).[4] The "use of a broad residual clause" was

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[3] Only the Second Circuit has held that, in light of the enactment of Section 1512, witness-related offenses may not be prosecuted under the omnibus clause of Section 1503. See *United States* v. *Hernandez*, 730 F.2d 895, 899 (2d Cir. 1984) (threat to kill a witness); *United States* v. *Jackson*, 805 F.2d 457, 461 (2d Cir. 1986) (dictum), cert. denied, 480 U.S. 922 (1987); see also *United States* v. *Masterpol*, 940 F.2d 760, 762-763 (2d Cir. 1991). The Second Circuit concluded that Congress's 1982 removal of the specific references to witnesses in Section 1503, coupled with a statement of a Senator in floor debate on the bill, leads to the conclusion that the legislature "affirmatively intended to remove witnesses entirely from the scope of § 1503." *Hernandez*, 730 F.2d at 898. For the reasons discussed in this brief, the Second Circuit's reasoning is unsound.

[4] The Senate bill would have made it a crime to

> with intent corruptly, or by threats of force, or by any threatening letter or communication, influence[],

intended "to carry forward the basic coverage" of Section 1503, because "the purpose of preventing an obstruction or miscarriage of justice cannot be fully carried out by a simple enumeration of the commonly prosecuted obstruction offenses." S. Rep. No. 532, *supra*, at 18. The bill would not have amended Section 1503 at all: both the omnibus clause and the specific references to witnesses were left intact.

When the bill was sent to the House, it substituted its own version, which did not include the omnibus clause in Section 1512 and which did amend Section 1503 to eliminate the explicit references to witnesses. See 128 Cong. Rec. 26,357, 26,358 (1982). There was no committee report on the House bill. The Senate then further amended the bill, leaving intact the basic structure of the House bill, including the omission of the omnibus clause in Section 1512 and the elimination of the specific clauses referring to witnesses in Section 1503. See 128 Cong. Rec. 27,391 (1982) (discussing changes Senate made to this portion of the bill). During the floor debate, Senator Heinz, one of the initiators and primary backers of the legislation, made two relevant statements concerning the differences between the House and Senate versions of the bill.

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obstruct[], impede[], or attempt[] to corruptly, or by threats of force, or by threatening letter or communications, influence[], obstruct[], [or] impede[] the—

(A) enforcement and prosecution of federal law;

(B) administration of a law under which an official proceeding is being or may be conducted; or

(C) exercise of a Federal legislative power of inquiry.

S. Rep. No. 532, *supra*, 2-3.

First, Senator Heinz addressed the omnibus clause. He explained that the omnibus clause in the Senate-passed Section 1512 "was taken out of the bill as beyond the legitimate scope of this witness protection measure" and because it "also is probably duplicative of [o]bstruction of justice statutes already in the books." 128 Cong. Rec. 26,810 (1982). The "duplicative" obstruction statutes to which he referred were Section 1503 and its administrative analogue, 18 U.S.C. 1505. Far from demonstrating an intent to eliminate all witness-related provisions from Section 1503, Senator Heinz thus relied on the continued applicability of Section 1503 as the basis for removing what would have been "duplicative" coverage in Section 1512.

Second, Senator Heinz stated that

> 18 U.S.C. 1503 already provides some witness protections—but only as to witnesses under subpena in active cases. The Senate passed bill allowed a slight overlap between old section 1503 and new sections 1512 and 1513. The House version amends section 1503 so it will make no mention of, and provide no protection to, su[b]penaed witnesses. The compromise accepts the House position. By amending section 1503 in this way, the proposal will contribute to a clearer and less duplicative law.

128 Cong. Rec. 26,810 (1982). That statement did not mean that the omnibus clause of Section 1503 no longer applied to witness-related offenses. Taken in context, the statement explained the removal of the specific references to witnesses from Section 1503. In light of the enactment of Sections 1512 and 1513, Congress believed those references to be duplicative. The desire to eliminate that specific duplication, how-

ever, does not suggest that Congress intended to remove all witness-related offenses from the scope of Section 1503, or to limit in some other way the scope of the omnibus clause of Section 1503. Indeed, as Senator Heinz's earlier statements made clear, he was relying on the continued protection of the omnibus clause to justify the omission of a virtually identical clause from Section 1512.

2. *The omnibus clause was not narrowed by the 1988 amendment to Section 1512.* In finding that Section 1503 did not embrace false statements to a grand jury witness, the court of appeals did not rely principally on the provisions enacted by the VWPA in 1982; rather, the court put its principal reliance on an amendment to Section 1512 that Congress enacted in 1988.[5] As originally enacted, Section 1512 did not expressly prohibit bribery or similar uses of non-coercive means to persuade a witness to withhold testimony or testify falsely. In November 1988, Congress remedied that defect by adding the words "or corruptly persuades" to Section 1512(b). Pub. L. No. 100-690, Tit. VII, Subtit. B, § 7029(c), 102 Stat. 4398. See Pet. App. 21a. According to the court of appeals, the "importance" of the amendment is that by enacting it "Congress indicated what type of non-coercive conduct was meant to be proscribed with regard to witnesses." *Id.* at 21a-22a. In the court's view, the 1988 amendment does not merely establish

[5] In 1986, Section 1512 had been amended to add what is now designated 18 U.S.C. 1512(a), which makes it a federal offense to kill or attempt to kill any person with intent to prevent the appearance of a witness, the production of evidence, or the communication of information relating to criminal offenses. Pub. L. No. 99-646, § 61, 100 Stat. 3614. That provision has no bearing on the issues in this case.

what kind of non-coercive conduct toward witnesses is prohibited by Section 1512; it also should be used "as a guide to interpreting the pre-amendment section 1503." *Id.* at 24a.

The court of appeals was mistaken. Initially, as the court itself acknowledged, the 1988 amendment to Section 1512 was enacted "approximately five months after the conduct forming the basis for the charge against [respondent] occurred." Pet. App. 21a. The amendment accordingly could have had no effect on Section 1503 (or, for that matter, Section 1512), as applied in this case. In addition, a dramatic leap of logic is required to conclude that Congress's intent to amend Section 1512 to prohibit certain conduct has any bearing on the proper interpretation of Section 1503, which the 1988 legislation left entirely untouched. See *United States* v. *Kenny*, 973 F.2d at 343 ("[T]he 1988 amendment does not change the plain language of the omnibus clause of 18 U.S.C. § 1503 and does not, therefore, preclude its general application to acts that obstruct justice."). Finally, the 1988 amendment did not in any way address the conduct at issue in this case. Respondent was not charged with "corrupt *persuasion*" of the FBI agents; he was instead charged with lying to the FBI agents with the intent that the false information he provided would in turn be furnished to the grand jury and would obstruct its investigation. Even if it could be inferred that Congress in 1988 intended that cases involving "corrupt persuasion" be prosecuted only under Section 1512 and not under the omnibus clause of Section 1503 (and for the reasons given above, no such inference should be drawn), there would be no basis for the further inference that Congress intended in 1988 to remove

cases that did *not* involve "corrupt persuasion" from the scope of the omnibus clause of Section 1503.

The court of appeals' reliance on the 1988 amendment of Section 1512 "as a guide to interpreting the pre-amendment section 1503," Pet. App. 24a, is particularly misplaced because the language of the two provisions is significantly different. The omnibus clause of Section 1503 has no direct counterpart to the phrase "or corruptly persuades" that Congress added to Section 1512 in 1988. The omnibus clause uses the all-embracing formulation "or corruptly * * * endeavors to influence, obstruct, or impede[] the due administration of justice." That difference in language strongly undercuts the court of appeals' determination to accord the same scope to the two formulations. Cf. *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

Respondent has argued (Br. in Opp. 16) that the court of appeals' conclusion finds support in the committee report on the 1988 amendment, which provides:

> It is intended that culpable conduct that is not coercive or "misleading conduct" be prosecuted under 18 U.S.C. 1512(b), rather than under the [omnibus] clause of 18 U.S.C. 1503. [The amendment], therefore, will permit prosecution of such conduct in the Second Circuit, where such prosecutions cannot now be brought, and will in other circuits result in such prosecutions being brought under 18 U.S.C. 1512(b).

H.R. Rep. No. 169, 100th Cong., 1st Sess. 12 (1987) (footnote omitted). That language expresses an intent that cases of "corrupt persuasion" could and should thenceforth be brought under Section 1512(b). Even as to such cases, it is doubtful that an expression of intent in a committee report on an amendment to one statute could affect the substantive scope of the criminal prohibition in another statute, which remained unchanged. The most reasonable reading of the report is thus as a communication from Congress to the Executive Branch concerning how future prosecutions should be brought, not as an attempt to amend Section 1503 by means of a committee report. Cf. *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 616-617 (1991). In any event, the committee report, like the amendment to which it was attached, addresses only cases of "corrupt persuasion," and it thus has no effect on cases like this that involve lying to prospective witnesses with the intent that the false information be communicated to the grand jury. The prohibition of such conduct in the omnibus clause of Section 1503 was not affected by Congress's action in 1988.

C. Neither The Fifth Amendment Nor The Rule Of Lenity Supports The Court Of Appeals' Holding

The court of appeals also briefly appealed to what it viewed as Fifth Amendment concerns that would be raised by "[c]onstruing section 1503 so broadly as to cover making false and misleading statements to FBI agents." Pet. App. 24a. Had respondent invoked his Fifth Amendment privilege and refused to speak with the FBI agents, his conduct would no doubt be constitutionally protected. Although the Fifth Amendment protects an individual's right to remain silent, it does not protect his right to obstruct grand jury proceedings through calculated false statements. See, *e.g.*, *Bryson* v. *United States*, 396 U.S. 64, 72 (1969) ("A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity

knowingly and willfully answer with a falsehood."); *United States* v. *Rodriguez-Rios*, 14 F.3d 1040, 1049-1050 (5th Cir. 1994) (en banc). Accordingly, Fifth Amendment concerns do not support the court of appeals' limitation of the scope of Section 1503.

Nor does the rule of lenity, upon which the court of appeals also relied, see Pet. App. 24a-25a, support its holding in this case. As this Court has repeatedly cautioned, "[t]hat maxim of construction is reserved for cases where, after seizing every thing from which aid can be derived, the Court is left with an ambiguous statute." *Staples* v. *United States*, 114 S. Ct. 1793, 1804 n.17 (1994) (internal quotation marks and brackets omitted). The broad language of the omnibus clause of Section 1503 leaves no room for ambiguity concerning any issue in this case. Accordingly, the rule of lenity has no application here.

II. SECTION 2232(c) PROHIBITED THE DISCLOSURE OF THE WIRETAP APPLICATION IN THIS CASE

Section 2232(c) of Title 18 protects the integrity of wiretaps that have been sought or authorized. It provides, in relevant part:

> Whoever, having knowledge that a Federal investigative or law enforcement officer has been authorized or has applied for authorization under chapter 119 [of Title 18] to intercept a wire, oral, or electronic communication, in order to obstruct, impede, or prevent such interception, gives notice or attempts to give notice of the possible interception to any person shall be fined under this title or imprisoned not more than five years, or both.

The statute requires proof of three elements. First, there is a knowledge element: "knowledge that a

Federal investigative * * * officer has been authorized or has applied for authorization * * * to intercept a wire * * * communication." Second, there is an intent element: the government must prove that the defendant disclosed information "in order to obstruct, impede, or prevent such interception." Third, there is the physical act of attempted disclosure: "gives notice or attempts to give notice of the possible interception." Contrary to the court of appeals' view, there is no requirement that a wiretap resulting from the application of which the defendant has knowledge must actually be in place when the defendant makes disclosure "of the possible interception."

1. The knowledge element of the offense is satisfied by showing that the defendant knew of either an authorization or an application for authorization to intercept communications. The government's theory in this case was that respondent knew of and divulged information regarding an application to intercept conversations in which Chapman was named as a potential interceptee.

The evidence clearly established the knowledge element. Judge Peckham testified that, because he "feared that Chapman might be going to use the judge's prestige of his office in the furtherance of Chapman's interest," 7 Tr. 922, he informed respondent that "in the course of a wiretap application that the name Abie Chapman had come up," 7 Tr. 921. As respondent himself later explained to Solomon, he "knew" the FBI was wiretapping Chapman because Judge Peckham had told him that "the F.B.I.'s up there getting * * * a * * * wire tap order on [Chapman]." J.A. 7. Respondent also confirmed the same fact to his nephew, who conveyed respondent's information about the wiretap to Chapman. Respondent's nephew testified that when respondent told him

about the wiretap, respondent "did say that he had overheard at work about the possibility of [Chapman's] phone being wiretapped." 5 Tr

2. The dispute in this case centers on the intent element of the offense. That element requires proof that the defendant disclosed or attempted to disclose information about either an application or authorization to intercept telephone communications "in order to obstruct, impede, or prevent such interception." In our view, that means that the defendant must have acted with the purpose of obstructing any interception that may have resulted from the government's application. It does not require that the interception in fact be occurring at the time the defendant makes his disclosure.

a. The court of appeals believed that the term "such interception" in the phrase "in order to obstruct * * * such interception" precluded a conviction in this case. See Pet. App. 8a-9a. As the court of appeals explained it, "no matter what 'concrete action' a defendant may take, if no wiretap exists or is currently authorized and if there is no pending application, there is no way that the defendant can obstruct or attempt to obstruct the possible interception of a wiretap." *Id.* at 14a-15a. Therefore, according to the court, "because the wiretap had expired at the time [respondent] acted, no violation of section 2232(c) occurred." *Id.* at 15a.

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[6] The application did not in fact propose to tap Chapman's telephone, although Chapman was named as an intended interceptee of the wiretap for which application was made. See Pet. App. 5a. The court of appeals attributed no significance to the fact that a wiretap was not proposed for Chapman's own telephone, and nothing in the statute suggests that anything turns on that fact.

The court of appeals erred in interpreting the term "such interception" to preclude conviction of a defendant for disclosing a wiretap that had already expired by the time he made the disclosure. Nothing in the statutory language suggests that result. The words "such interception" are the object of the phrase "in order to obstruct." That phrase, in turn, identifies the specific intent with which the defendant must have acted and the object that the defendant sought to attain.[7] A defendant can intend to obstruct a wiretap that is not in operation, or even a wiretap that was never authorized. So long as the defendant acted with the object of obstruction, the intent element of the statute, as written by Congress, is satisfied.

Indeed, the fact that the wiretap—unbeknownst to the defendant—was not in operation or had never been authorized is generally of no relevance in determining whether the defendant acted "in order to obstruct * * * such interception." Section 2232(c) prohibits disclosure of information learned from a wiretap application, as well as information learned from a wiretap authorization order.[8] An individual, like respondent, who learned of a wiretap application would ordinarily have no way of knowing whether

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[7] A leading dictionary defines "in order to" as "for the purpose of." *Webster's Third New International Dictionary* 1588 (1986). "Purpose" is defined as "something that one sets before himself as an object to be attained." *Id.* at 1847.

[8] Cf. *United States* v. *Zemek*, 634 F.2d 1159, 1176-1177 (9th Cir. 1980) (in prosecution for obstruction of a criminal investigation under 18 U.S.C. 1510, investigation need not be taking place concurrently with proscribed acts), cert. denied, 450 U.S. 916, 985, and 452 U.S. 905 (1981).

or when the application had been initially approved or when the interception had begun. So long as he intended to bring about the forbidden result—*i.e.*, so long as he acted "in order to obstruct * * * such interception"—his state of mind satisfied the intent element of the statute.

That result follows directly from this Court's decision in *United States* v. *Russell*, 255 U.S. 138 (1921). In *Russell*, the defendant was indicted for an "endeavor" to influence a juror, in violation of the statutory predecessor to Section 1503. The indictment, however, did not allege that the person who was the object of the defendant's approach had yet been selected or sworn as a juror when the defendant made his approach. 255 U.S. at 142, 143. This Court held that fact immaterial, explaining that the defendant "had some purpose in his approach" and the word "endeavor" describes "any effort or essay to accomplish the evil purpose that the section was enacted to prevent." *Ibid.* The phrase "in order to" in Section 2232(c) has much the same meaning as "endeavor" in Section 1503: both describe the intent of the defendant, not the result that is achieved. Accordingly, just as in *Russell*, the defendant can be found to have acted with the requisite intent even if he could not achieve his goal.[9] See also *Osborn* v. *United States*, 385 U.S. 323, 332-333 (1966).

[9] The court of appeals attempted to distinguish *Russell*, arguing that this case is analogous to what would have occurred in *Russell* "had there been no trial contemplated at all, and thus no possible jurors to attempt to influence." Pet. App. 14a. In such a case, according to the court, "it would have been legally impossible for the defendant to have committed a statutory violation." *Ibid.* But the hypothesized case would not have constituted a violation of Section 1503, because an independent element of a Section 1503 violation is that there be a pending proceeding, and that element would not be satisfied. The analogous case under Section 2232(c) would be if there had been no wiretap application at all, and the defendant simply mistook some other pleading for a wiretap application. In that case, the defendant could not be convicted of a violation of Section 2232(c), because he would not have had "knowledge that a Federal * * * officer * * * applied for authorization * * * to intercept a wire * * * communication."

The legislative history makes clear that Section 2232(c) does not require that an authorization be in effect or an application pending at the time the defendant makes his disclosure. The Senate report explained that the statute requires proof that "the defendant have knowledge that the Federal law enforcement or investigative officer has been authorized or has applied for an interception order." S. Rep. No. 541, 99th Cong., 2d Sess. 34 (1986). The report went on to state that the authorization need not be in effect at the time the disclosure is made: "The defendant must engage in conduct of giving notice of the possible interception to any person who *was or is* the target of the interception." *Ibid.* (emphasis added). The report also stated that "[t]he offense also includes an attempt to engage in the offense," *ibid.*, indicating that a prosecution may be brought even when the disclosure did not or could not have actually interfered with the interception. The House report included substantially identical language. H.R. Rep. No. 647, 99th Cong., 2d Sess. 60-61 (1986).

The jury instructions in this case accurately described the intent requirement of Section 2232(c). The court instructed that "it is not necessary that at

the time the disclosures were made the interception was still going on." J.A. 120. Instead, the court instructed, the jury must determine whether or not it was respondent's "intent, by giving notice or attempting to give notice, to in some way impede or interfere with the interceptions that have been applied for." *Ibid.*

b. The absence of actual interception under a wiretap is relevant in one sense under Section 2232(c). If the defendant *knew* at the time he made the disclosure that the wiretap had never been authorized or that it had been terminated, that knowledge would constitute compelling evidence that he did not act "in order to obstruct * * * such interception." That is because such knowledge would negate the intent element of the offense; an individual ordinarily cannot be said to have acted in order to accomplish an end that he himself knows is impossible.

In this case, however, there was no reason to believe that respondent thought that no wiretap was authorized or in place when he alerted Chapman to the possible interception. Although respondent made his disclosure in February 1988—five months after learning from Judge Peckham of the application to intercept Chapman's communications—that does not suggest that he knew that the wiretap had expired by the time he made his disclosure. There is no absolute temporal limit—and certainly no five-month limit—on how long an interception may continue under federal law. Under 18 U.S.C. 2518(5), "[n]o [wiretap] order * * * may authorize * * * the interception of any wire * * * communication for any period longer than * * * thirty days." The statute also provides, however, that "[e]xtensions of a[] [wiretap] order may be granted" if a new application is submitted and the court makes the necessary findings. *Ibid.* See *United States* v. *Giordano*, 416 U.S. 505, 530-533 (1974). Although "[t]he period of extension [pursuant to a given extension application] shall be no longer than * * * thirty days," 18 U.S.C. 2518(5), there is no limit on how many successive applications may be submitted or how many extensions may be granted.[10]

In any event, the evidence presented to the jury in this case made it quite clear that respondent believed that the interception was continuing when he made his disclosure. On February 6, 1988, respondent called his nephew and told him to come to his house "right now, it's very, very urgent." Tape N-504. He told his nephew that "I need to get a message to [Chapman], who was just here a minute ago. * * * But I can't talk over the phone." *Ibid.* That alone suggests that he believed that the inter-

[10] It is not uncommon for the government to obtain several extensions to a wiretap order in a complex criminal case. For example, in *United States* v. *Ojeda Rios*, 495 U.S. 257, 260-261 (1990), one wiretap was authorized on May 11, 1984, and continually extended until October 10, 1984; a wiretap on a different telephone was authorized on November 1, 1984, and extended until May 30, 1985; two other wiretaps lasted for an initial period plus two extensions; and one wiretap lasted only for a single month, with no extensions. See also, *e.g.*, *United States* v. *Gallo*, 863 F.2d 185, 191-193 (2d Cir. 1988) (wiretap authorized in November 1982 and extended through August 1983), cert. denied, 489 U.S. 1083 (1989); *United States* v. *Williams*, 737 F.2d 594, 600 (7th Cir. 1984) (wiretap authorized in early 1979 and extended into 1980), cert. denied, 470 U.S. 1003 (1985); *United States* v. *Poeta*, 455 F.2d 117, 119 (2d Cir.) (wiretap authorized in March 1970 and extended through June 1970), cert. denied, 406 U.S. 948 (1972).

ception was continuing. Indeed, respondent believed that the authorization had been granted and extended until *after* the date he made the disclosure: as he stated to Solomon in a conversation secretly taped on May 17, more than three months after the disclosure, "[o]h yeah the phone's definitely tapped. * * * Absolutely." J.A. 21.

Based on those facts, the jury reasonably concluded that respondent acted "in order to obstruct * * * such interception." As it turned out, the original authorization of which respondent had knowledge resulted in a wiretap order that expired after 30 days, on May 21, 1987, although it was later reauthorized and extended further with respect to the same telephone number and an overlapping, though changing, list of interceptees. See Pet. App. 5a. Those facts, however, are of no significance, for there is no evidence that respondent *knew* that the wiretap had ever expired (or that it had ever been reauthorized).[11] In the absence of such knowledge, the termination, reauthorization, and extension of the interception order that in fact occurred in this case do not suggest that there was any error in the jury's finding that respondent acted "in order to obstruct * * * such interception."

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[11] This Court therefore need not reach the question whether the reauthorization and successive extension orders of the wiretap in this case should be regarded as extensions of the original wiretap order, since they involved the same telephone number and an overlapping, though changing, list of interceptees. Cf., *e.g.*, *United States* v. *Carson*, 969 F.2d 1480, 1487-1489 (3d Cir. 1992) (discussing whether successive interception orders were extensions of original interception order, for purposes of "sealing" requirement of 18 U.S.C. 2518(8)(a)).

3. The third, physical act element of the statute requires proof that the defendant "g[a]ve[] notice or attempt[ed] to give notice of the possible interception." The government proved that element at trial by showing that respondent informed Chapman, through respondent's nephew, Steve Aguilar, that Chapman's telephone conversations were being intercepted.

a. The evidence was more than sufficient to support the jury's conclusion that respondent gave the requisite notice. Steve Aguilar testified at trial that, after he arrived at respondent's house in response to respondent's telephone call, respondent told him that respondent "had overheard at work about the possibility of [Chapman's] phone being wiretapped." 5 Tr. 825. Steve drove to Chapman's house and informed Chapman of that fact. *Ibid.* Later that day, respondent again called Steve and asked him to come to his house. Replying to respondent's questions, Steve told him that he had conveyed the information to Chapman. 5 Tr. 826-827.

There was substantial corroboration to show that respondent had conveyed the information to Chapman. After February 6, 1988, Chapman used an alias ("Dr. Green") when he called respondent. See, *e.g.*, Tape O-1449, O-2022, O-3092. On February 29, 1988, Chapman told Tham that someone "very big" had told him that his telephone was tapped. Tape M-1189. Finally respondent himself explained to Solomon in one of the secretly taped conversations precisely how he instructed his nephew to tell Chapman about the wiretap. Respondent said,

> I told my nephew and I said I want you to tell him not over the phone. You get to his house and tell him. He says I'm gonna go see him

> tonight. So he went and saw him that night and told him and then the next time I talked to Abe he called me from a pay phone. He only calls me from pay phones.

J.A. 21-22.

b. The court of appeals may also have believed that respondent's conduct did not satisfy the disclosure element of the offense, on the ground that there was no "possible interception" at the time the disclosure was made. See Pet. App. 12a-13a. The court stated that, because "the element of 'possible interception' must be met[,] * * * the wiretap must be in existence or there must be a pending application or authorization." *Id.* at 13a.

The court of appeals' construction of the words "possible interception" conflicts with the plain language of the statute. The statute does not refer to a "pending application" but to an "application." And it does not refer to an "actual interception," or an "interception" *simpliciter*, but to a "possible interception." As ordinarily understood, the use of the term "possible" indicates that the government need *not* prove that the actual wiretap was in operation or that the authorization for a wiretap was pending at the time the disclosure was made. To the contrary, the term "possible" indicates that it is a crime to disclose a wiretap application, regardless of whether an actual wiretap was in operation. So long as the defendant believed it was "possible" that an operational wiretap resulted or would result from the application of which he had knowledge at the time he made the disclosure, the disclosure element is satisfied.

Any other interpretation of the term "possible" would result in an untenable interpretation of the

statute. One of the predicates for the application of the statute is the defendant's knowledge of a wiretap application. Since some wiretap applications may not be approved, a defendant who learns of an application may well be unaware of whether any interception was likely to or did occur. There is no basis in the statutory language to conclude that Congress intended that such a defendant can avoid conviction by proving that the application had in fact—and unbeknownst to him—been denied before he made his disclosure.

Indeed, if such a windfall defense were recognized, other defenses not discussed by the court of appeals presumably would have to be recognized as well. As the dissenting judges noted, see Pet. App. 27a, if the telephone line or the wiretap equipment was malfunctioning, the defendant would be able to escape conviction because no interception was therefore "possible." Similarly, if the interceptee had simply ceased using the telephone to be tapped, for reasons unrelated to the wiretap, a defendant who later disclosed the wiretap with the intent to obstruct the interception could not be convicted, since no interception would have been "possible." There is no reason to believe that Congress would have wanted to create such defenses to Section 2232(c). Yet such defenses would be a logical result of the court of appeals' interpretation.

4. The court of appeals suggested that the rule of lenity and First Amendment considerations support its interpretation. See Pet. App. 9a-10a, 11a-12a. As with the obstruction statute, resort to the rule of lenity is unnecessary because both the language and the intent of Section 2232(c) are unambiguous.

Nor does the construction of the statute we advocate raise a substantial First Amendment concern.

Under any construction, the statute limits some disclosure of information that could be of public interest. But the statute only prohibits disclosures made with the intent to impede or obstruct a possible interception. Where the disclosure is made with that intent—rather than an intent "to correct past government misconduct and to avert similar abuses of power in the future," by disclosing "politically-motivated wiretaps, such as those that occurred at the height of the civil rights movement," Pet. App. 11a-12a—the defendant can plainly be prosecuted under Section 2232(c). Moreover, it has long been settled that the government may prohibit individuals in a position of confidence, such as respondent, from disclosing confidential information that they receive in their official capacity. See, *e.g.*, *Snepp* v. *United States*, 444 U.S. 507, 511 & n.6 (1980) (per curiam). Indeed, the grand jury secrecy requirement of Fed. R. Crim. P. 6(e) is based on essentially the same rationale as Section 2232(c), and it is enforceable through a criminal contempt sanction or, in an appropriate case, a prosecution for obstruction of justice. See, *e.g.*, *United States* v. *Jeter*, 775 F.2d 670, 678-679 (6th Cir. 1985) (rejecting argument that First Amendment provides defense to charge of obstructing justice by violating Rule 6(e)), cert. denied, 475 U.S. 1142 (1986); *United States* v. *Howard*, 569 F.2d 1331, 1336 (5th Cir.), cert. denied, 439 U.S. 834 (1978).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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QUESTIONS PRESENTED

1. Do false statements to FBI agents during an informal investigative interview constitute obstruction of justice within the meaning of 18 U.S.C. § 1503?

2. Does disclosure of the existence of a wiretap authorization that has expired constitute a violation of 18 U.S.C. § 2232(c)?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

No. 94-270

THE UNITED STATES OF AMERICA

v.

ROBERT P. AGUILAR

BRIEF OF RESPONDENT

STATEMENT

On April 19, 1994, a unanimous eleven-member, *en banc* panel of the Ninth Circuit reversed the conviction of respondent Robert P. Aguilar, a judge of the United States District Court for the Northern District of California, for obstruction of justice in violation of 18 U.S.C. § 1503. Nine of the eleven panel members also agreed to reverse Judge Aguilar's conviction for disclosure of a wiretap authorization in violation of 18 U.S.C. § 2232(c). In each instance, the Ninth Circuit ruled that the record did not establish a violation of the statute.

A. History Of The Proceedings Below

Judge Aguilar was charged originally in an eight-count indictment along with Michael Rudy Tham ("Tham") and Abie Chapman ("Chapman") on June 13, 1989. The centerpiece of the charges against Judge Aguilar was that he violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), by obstructing the affairs of the U.S. District Court for the Northern District of California through a pattern of racketeering activity. The government charged Judge Aguilar, Tham and Chapman with one count of conspiracy to deprive the United States of its governmental rights and functions and to obstruct justice in connection with Tham's *habeas corpus* petition before the Honorable Stanley Weigel in violation of 18 U.S.C. § 371, and with one count of endeavoring to obstruct justice in violation of 18 U.S.C. § 1503. The government also charged Judge Aguilar alone with three additional violations of 18 U.S.C. § 1503; and two counts of unlawful disclosure of an application for a wiretap authorization in violation of 18 U.S.C. § 2232(c). *See* Pet. 4a, 30a.[1]

On March 19, 1990, a jury acquitted Judge Aguilar of one count of obstruction of justice, but was unable to reach a verdict on the remaining counts. The district court accordingly declared a mistrial. The district court later granted the unopposed motion of the government to dismiss with prejudice the RICO charge and one obstruction of justice count against Judge Aguilar and also granted the

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[1] Citations will appear as follows: Brief for the United States ("Gov't Br."); Petition for a Writ of Certiorari ("Pet."); Appendix to the Petition for a Writ of Certiorari ("Pet. App."); Joint Appendix ("J.A."); Brief in Opposition ("Opp. Cert."); Trial Exhibits ("Exh."); and Trial Transcripts ("Tr.").

unopposed motions of Tham and Chapman for severance. A second jury acquitted Judge Aguilar of all counts connected with the underlying conspiracy to influence Judge Weigel, one wiretap disclosure count and one count of obstruction of justice, but convicted him of one count of endeavoring to obstruct justice in violation of 18 U.S.C. § 1503 and of unlawfully disclosing the existence of a wiretap application in violation of 18 U.S.C. § 2232(c). *Id.* at 4a-5a, 30a, 67a-68a; 15 Tr. 1590-91.

A divided panel of the Ninth Circuit reversed the obstruction of justice conviction and affirmed the wiretap disclosure conviction. Pet. App. 29a-113a. A majority concluded that, as to both counts, the district court erroneously relieved the government of its burden to prove beyond a reasonable doubt the element of knowledge, essential to both counts of conviction, by requiring the government to establish only what Judge Aguilar "probably" knew. *Id.* at 77a-90a, 100a-101a, 102a, 104a-105a. A different majority found that the erroneous jury instruction was harmless as to the wiretap disclosure conviction. *Id.* at 51a-52a, 103a-104a.

On rehearing *en banc*, the Ninth Circuit did not find it necessary to reach the knowledge issue. *Id.* at 25a. Instead, the court reversed both counts on the grounds that the conduct did not violate the statutes under which it was charged. *Id.* at 1a-28a. The eleven *en banc* panel members agreed unanimously that the government had not identified a violation of Section 1503. The court affirmed that there was "no evidence that a grand jury had authorized or directed the FBI investigation, [or] . . . that the FBI agents had been subpoenaed to testify." *Id.* at 18a. Thus, "[t]he conduct alleged was interference with an FBI investigation, not a judicial proceeding." *Ibid.* The court held that "interference with an FBI investigation" by making false statements during an informal interview did not obstruct or

impede a pending judicial proceeding in violation of Section 1503. *Id.* at 18a-24a.

The *en banc* court also held, over the dissent of only two of its members, that the alleged conduct failed to establish that Judge Aguilar had violated 18 U.S.C. § 2232(c). *Id.* at 8a-15a; 25a-28a. The court reasoned that "[t]he plain language of the statute makes it clear that the purpose of the statute is to prevent interference with 'possible interception.'" *Id.* at 9a (quoting 18 U.S.C. § 2232(c)). Since the government charged Judge Aguilar with attempting to give notice of an authorization to intercept certain electronic communications that had expired more than eight months before the disclosure, *id.* at 5a-8a, the government failed to establish a violation of Section 2232(c). *Id.* at 15a.

B. Statement Of The Facts

The facts relevant to the questions of statutory interpretation presented to the Court are few. Rather than state the pertinent facts, however, the government once again finds it necessary to misuse evidence connected with the conspiracy and obstruction charges of which Judge Aguilar was acquitted. *See* Gov't Br. 4-8. As we have noted before, Opp. Cert. 4-5 & n.1, these digressions are irrelevant. To the extent that they luridly portray supposed facts relating only to the counts of acquittal, they are offensive and demean the process by which they were found insufficient. Because the government's "Statement" is

unnecessarily burdened by this extraneous matter, respondent finds it necessary to re-state the pertinent facts.

1. Events Related to the Section 2232(c) Charge

This case arises out of a prolonged, extensive and ultimately fruitless FBI probe of possible labor racketeering activities by the late Abie Chapman, then an 83-year old relative of Judge Aguilar with a criminal record, and Rudy Tham. 4 Tr. 669; 7 Tr. 966, 982. On April 20, 1987, the FBI obtained an authorization signed by Judge Robert Peckham of the United States District Court for the Northern District of California for a 30-day wiretap on phones used by Tham. Chapman was named on the application as someone whose conversations might be intercepted. The wiretap expired without renewal on May 20, 1987, and on May 21, 1987 Judge Peckham signed an order terminating the wiretap. 7 Tr. 917-919, 929, 933-35; Pet. App. 5a. While there is evidence in the record that subsequent wiretaps were authorized on Tham's phones, *see* Gov't Exh. 1B, there is no evidence in the record that Chapman was named as an interceptee of these subsequent wiretaps or that the April 20 wiretap was ever extended or reauthorized.[2]

On July 9, 1987, an FBI agent assigned to Chapman observed Judge Aguilar eating lunch with Chapman. 7 Tr. 964-69. On August 5, 1987, the Special Agent in charge of the FBI's San Francisco office visited Judge Peckham and told him that Judge Aguilar had been seen in Chapman's company. 7 Tr. 920, 938, 986, 1010.

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[2] Many of the facts in this Statement of the Facts are drawn directly from the *en banc* panel's opinion, which, except for its statement that Chapman was listed as an interceptee on the subsequent wiretaps, adequately and accurately sets forth the relevant facts. *See* Pet. App. 2a-7a, 16a.

Four days later, Judge Peckham met Judge Aguilar at a social function and told him that Abie Chapman's name had come up "in the course of" or "in connection with" a wiretap application. 7 Tr. 921, 942. Judge Aguilar responded that he "[knew] the old man." 7 Tr. 921, 942-43; *see also* 9 Tr. 1213-14. In fact, Chapman was married to Josephine Knaack, an old friend of the Aguilar family and the mother of Judge Aguilar's sister-in-law. 5 Tr. 821-22; 9 Tr. 1207-08. Judge Aguilar had no other knowledge of the application to intercept Tham's calls, which had by then already expired, and no further conversations with Judge Peckham on this subject. *See* Pet. App. 69a, 88a.

Six months later, on February 6, 1988, Chapman invited himself to Judge Aguilar's home. After a few minutes and two drinks, Chapman got up to leave. As Judge Aguilar walked outside with Chapman, he noticed a man holding a camera and attempting to conceal himself from Judge Aguilar in a car across the street. When Chapman drove away, the man followed. 5 Tr. 802-03, 815; 9 Tr. 1256-58, 1328-29; Pet. App. 7a.

Judge Aguilar called his nephew, Steve Aguilar (Marilyn Knaack Aguilar's son) and asked him to come over. 5 Tr. 821-23; 9 Tr. 1271, 1328; Pet. App. 7a. When Steve Aguilar arrived, Judge Aguilar told him that he had seen an FBI agent following Chapman and that he heard at work that telephones might be tapped. He asked Steve to go to his mother's house and personally tell Chapman that he did not want Chapman to call or visit him any more. Steve Aguilar relayed the message. 5 Tr. 824-26, 832; 9 Tr. 1272-73; Pet. App. 7a. There was no evidence that Chapman's phone lines were ever tapped, and the only wiretap of which Judge Aguilar might have had knowledge had expired eight months before. Pet. App. 7a.

2. *Events Related to the Section 1503 Charge*

In late 1987, Chapman and the late Edward Solomon, whom Judge Aguilar knew from law school, visited Judge Aguilar's house with a Section 2255 petition collaterally attacking Tham's conviction for embezzlement, which was then pending before Judge Weigel, Judge Aguilar's colleague. 4 Tr. 602-03, 606, 608, 611, 643; 9 Tr. 1206, 1215-17. Judge Aguilar looked at the motion, advised Solomon (who was representing Tham) to get the case on the calendar, and stated that Judge Weigel would give Solomon a "fair shot" on the motion. 4 Tr. 611-13, 646, 651-54, 719-27; 9 Tr. 1215-20.

Although Judge Aguilar inquired of Judge Weigel concerning the status of the Section 2255 petition, Judge Weigel testified unequivocally that Judge Aguilar made no attempt to influence his ruling on the petition. 9 Tr. 1224-28, 1236-37, 1249; Pet. App. 4a. The jury agreed, acquitting Judge Aguilar of the charge that he conspired with Tham, Solomon and Chapman to influence Judge Weigel. Pet. App. 4a.

Unlike the jury, the FBI did not believe Judge Weigel when he told them that Judge Aguilar had not acted improperly. Instead, the FBI pressed him to wear a tape recording device to a luncheon that he was to attend with Judge Aguilar in order to record any statement Judge Aguilar made to him. Judge Weigel was highly incensed at the FBI's request and he refused. 9 Tr. 1240-42. Judge Weigel then recused himself from Tham's petition, which he had preliminarily decided to deny, not because of questionable conduct by Judge Aguilar, but because the FBI's intervention left him no choice. 9 Tr. 1236, 1245.

On May 10, 1988, the FBI approached Solomon, told him that his phones had been tapped, and accused him of obstruction of justice. 4 Tr. 617, 669-74. Solomon

subsequently wore a recording device to two meetings with Judge Aguilar in an attempt to elicit information for the FBI. 4 Tr. 617, 684-85, 687-88; 8 Tr. 1102; *see* J.A. 5-63. Based on these conversations, the government also charged that Judge Aguilar violated 18 U.S.C. § 1503 by attempting to induce Solomon to testify falsely. The jury acquitted Judge Aguilar of this charge as well. Pet. App. 4a; 15 Tr. 1591.

By virtue of the wiretaps, Solomon's cooperation, the recorded conversations between Judge Aguilar and Solomon, and the interview of Judge Weigel, the FBI was familiar with all the relevant facts concerning Judge Aguilar's relationship with Solomon and Chapman and whether Judge Aguilar had attempted to intervene with Judge Weigel. J.A. 67-68. Nevertheless, on June 22, 1988, two FBI agents interviewed Judge Aguilar on these subjects for no apparent purpose other than to induce Judge Aguilar to make false statements. "There [was] no evidence that a grand jury had authorized or directed the FBI investigation; nor [was] there evidence that the FBI agents had been subpoenaed to testify." Pet. App. 18a.

Judge Aguilar explained to the agents that he was asked by someone, probably Chapman, to find out when there would be a hearing on a motion, and that Judge Aguilar had done so. J.A. 67-71, 81-82. In response to an agent's question, Judge Aguilar told them that he had known Solomon since 1955, J.A. 73, and that he had found out recently that Solomon was Tham's attorney. J.A. 73. Judge Aguilar said that he did not discuss the Tham matter with Solomon, J.A. 74, 81, and that he did not find out or learn of any wiretap order on Chapman. J.A. 83-84. The jury found at least one of these statements to be false.

During the interview, Judge Aguilar repeatedly sought to determine whether a grand jury was reviewing the issues that were the subject of the FBI interview and the

agents rebuffed or evaded his questions. *See* J.A. 64-95. Throughout the colloquy that included the statements found to be false, neither the agents nor Judge Aguilar mentioned a pending grand jury proceeding, although Judge Aguilar asked the agents whether he was a target of their investigation. *After* the false statements were made, Judge Aguilar asked again whether he was a "target." On this occasion, an agent answered with a confusing response about grand jury proceedings, but did not directly confirm that a grand jury was meeting, that Judge Aguilar was a subject of its inquiry, or that they were working on behalf of the grand jury. *See* J.A. 86-87. Judge Aguilar later testified that "*[a]fter* the interview was over" it was his "*impression*" that his statements would be reported to the grand jury. 9 Tr. 1360 (emphasis added).

SUMMARY OF ARGUMENT

In the face of unmistakable evidence that Congress has repeatedly sought to narrow the scope of 18 U.S.C. § 1503 as it applies to witnesses, petitioner asks this court dramatically to expand it. Turning its back on statutes that have traditionally and explicitly addressed false statements to FBI agents during informal investigative interviews, the government seeks instead for the first time to employ the "omnibus clause" of Section 1503, on the theory that the agents were "potential" grand jury witnesses whose hearsay testimony, if false, might impede the grand jury. Petitioner's efforts are unsupported by precedent, the language of the statute, the statutory scheme of which it is part, the relevant legislative history, or even the need to protect the integrity of the grand jury or of FBI investigations. The Ninth Circuit *en banc* correctly and unanimously concluded that such conduct does not and has never fallen within the proper scope of Section 1503.

Before Judge Aguilar's prosecution, *no* court had ever applied Section 1503 to false statements to FBI agents as potential grand jury witnesses. To the contrary, courts interpreting Section 1503 in this setting have consistently required the government to demonstrate a nexus between the wrongful act and the lawful exercise of the grand jury's authority. These decisions, as well as others construing Section 1503, have recognized the need to interpret the "omnibus clause" in accordance with its own terms, the specific prohibitions of Section 1503, and the unified statutory scheme of which it forms a part. Petitioner turns its back on language, statute and context, and argues instead that the "omnibus clause" subsumes *any* conduct, however far removed from the administration of justice, that might conceivably have an effect on a judicial proceeding. That interpretation, while perhaps broad enough to encompass the conduct charged here, would suck into a statutory vacuum the specific prohibitions of Section 1503, as well as most of the remaining offenses enumerated in Sections 1501 through 1515.

Whatever appeal such an interpretation may once have had, it was foreclosed in 1982 with the passage of the Victim Witness Protection Act, through which Congress removed all references to witnesses from Section 1503 and enacted Section 1512 to address all forms of obstruction related to witnesses. The VWPA, and all of the relevant legislative history, confirm that Congress never intended the "omnibus clause" of Section 1503 to be applied to conduct, such as false statements to witnesses, that is expressly addressed by specific provisions of Section 1512.

The Ninth Circuit also correctly held that 18 U.S.C. § 2232(c) does not prohibit the disclosure of wiretaps that have expired. The language of Section 2232(c) is unambiguous; it applies only to the disclosure of interceptions that are "possible." The knowledge and intent

requirements of Section 2232(c) confirm that the statute was intended to protect the secrecy of authorizations to intercept electronic communications while they are in effect or while applications are pending. Once a wiretap has expired, however, interception is no longer "possible" and Section 2232(c) no longer prohibits its disclosure.

Without support from the language of the statute, the decisions of other courts, or even meaningful legislative history, petitioner asks the Court to reject this conclusion, which conscientiously comports with the statute's express terms, in favor of a result born of wishful thinking. While it is possible to imagine a broader statute, addressing different interests, and employing other terms, Congress did not enact it.

I. FALSE STATEMENTS TO FBI AGENTS DO NOT CONSTITUTE A VIOLATION OF 18 U.S.C. SECTION 1503

A. The Unanimous *En Banc* Court Correctly Held That Section 1503 Does Not Reach False Statements Made To FBI Agents

Section 1503 provides:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror

> in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, *or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice*, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1503 (emphasis supplied). The government and some courts have referred to the highlighted text as the "omnibus clause." Gov't. Br. 16; *see e.g. United States v. Marrapese*, 826 F.2d 145, 148 (1st Cir.), *cert. denied*, 484 U.S. 944 (1987). Judge Aguilar was charged with "corruptly endeavor[ing] to influence, obstruct, and impede . . . the due administration of justice," J.A. 106, under the terms of that clause.

In addressing the application of Section 1503 to the conduct alleged to have been engaged in by Judge Aguilar, the petitioner marches through a desultory exposition of the elements of the offense of obstruction, as though the issue in this case were the sufficiency of the evidence, rather than the straightforward question of statutory construction resolved unanimously by the *en banc* Court. *See* Gov't Br. 16-21. In order to obtain a conviction for obstruction of justice, the government preliminarily must prove that there was a judicial proceeding pending of which the defendant had knowledge at the time of the alleged obstruction and that the defendant had a specific intent to obstruct that proceeding.

Pettibone v. United States, 148 U.S. 197, 204-05 (1893) (construing predecessor to Section 1503). But proof of these elements of an offense under Section 1503 is not at issue here.[3]

On the question petitioner posed to the Court -- whether false statements to FBI agents who are potential grand jury witnesses constitute an endeavor to obstruct justice under Section 1503 -- petitioner strikes only a glancing blow. Petitioner's reticence is hardly surprising, since it cannot articulate a consistent theory of how such conduct might have influenced the grand jury, much less whether the statute reaches that far. At times, petitioner contends that Judge Aguilar, aware that a grand jury may receive hearsay testimony, intended to obstruct the grand jury's functions by conveying false testimony to the grand jury through the medium of the potential FBI hearsay declarants. Gov't Br. 21. This attenuated series of connections, the petitioner contends, differs only incidentally from the direct "submission of false or misleading documents or testimony to a grand jury," punishable under Section 1503. *Id.* Elsewhere, however, petitioner asserts that Judge Aguilar intended through his false statements to "avoid

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[3] The last court to speak on the issue held that the government had not proven that Judge Aguilar had knowledge of the grand jury proceedings, because the trial court, at the government's insistence and over the defendant's objection, gave a jury instruction that erroneously equated knowledge with an "aware[ness] of a high probability of the existence of [a] circumstance" and impermissibly lowered the government's burden of proof. Pet. App. 77a-90a, 100a-101a, 102a, 104a-105a. The *en banc* court did not find it necessary to reach this issue. *Id.* at 25a. Should the *en banc* court's decision be reversed, the validity of the knowledge instruction once again will be dispositive. In any event, petitioner's repeated references to what Judge Aguilar "knew" are colored by the government's failure at trial to establish those facts as required by law. We treat these facts as established only for the limited purpose of the questions presented here.

testifying himself before the grand jury," Gov't Br. 19, apparently by indirectly discouraging the grand jury from seeking to compel him to appear personally before it.

What these theories share is the premise that the so-called "omnibus clause" of Section 1503 extends to any conduct that, washed downstream on a current of causation, might potentially influence the grand jury's deliberations. Right or wrong as a matter of epistemology, the petitioner's premise enjoys scant support from prior judicial decisions or the terms of the statute, and it is inconsistent with the statutory scheme of obstruction statutes. To our knowledge, prior to this case no court had ever held that a mere false statement to an FBI agent or potential witness constituted a violation of Section 1503. The absence of precedent flows from the terms of the statute, which do not encompass "potential" witnesses, and certainly do not reach mere false statements to "potential" witnesses. If the scope of the "omnibus clause" is held to be as vast as the government claims, it will engulf many of the other obstruction statutes that Congress has deliberately enacted and carefully tailored to address specific harms. The government's reach has exceeded the statute's grasp.

1. Section 1503 Never Has Been Held to Apply to False Statements to Witnesses Absent a Direct Nexus Between The Witness and a Judicial Proceeding

This is not the first time that the government has sought to use Section 1503 to punish efforts to obstruct a criminal investigation on the theory that the conduct might, in addition, also interfere with the grand jury. The decision of the Ninth Circuit in this case is consistent with all prior decisions applying Section 1503 in these circumstances, including every case identified by the government: every

single court to construe Section 1503 in this setting has required a direct nexus between the conduct alleged to be criminal and the lawful exercise of the grand jury's authority.[4]

The courts have rebuffed efforts to shoehorn within Section 1503 conduct that does not implicate the exercise by the grand jury of its authority to compel the truthful testimony of witnesses or the production of documents.[5] In striving to maintain the requirement of a direct nexus, the Courts have refused to employ Section 1503 even in circumstances where the allegedly wrongful conduct might theoretically influence the evidence ultimately received by the grand jury. For example, in *United States v. Brown*, 688 F.2d 596, 597 (9th Cir. 1982), the Court of Appeals reversed the conviction of a police officer under Section 1503 for attempting to warn the target of a valid search warrant in order to prevent the seizure of a quantity of heroin. In *Brown*, there was the possibility that the fruits of the search might be presented to the grand jury and therefore the risk that interference with the search would impede the

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[4] *See, e.g. United States v. Langella*, 776 F.2d 1078 (2d Cir. 1985), (false testimony to the grand jury), *cert. denied*, 475 U.S. 1019 (1986); *United States v. McComb*, 744 F.2d 555 (7th Cir. 1984) (alteration of documents subpoenaed by grand jury); *United States v. Shoup*, 608 F.2d 950, 959-63 (3d Cir. 1979) (falsification of evidence by contractor hired to assist grand jury investigation); *United States v. Walasek*, 527 F.2d 676 (3d Cir. 1975) (destruction of documents subpoenaed by grand jury).

[5] *See United States v. Brown*, 688 F.2d 596, 598 (9th Cir. 1982) ("the obstruction of a government agency's investigation is insufficient to trigger § 1503"); *United States v. Simmons*, 591 F.2d 206, 208 (3d Cir. 1979) (obstruction of an FBI investigation does not violate Section 1503); *United States v. Fayer*, 573 F.2d 741, 745 (2d Cir.) (same), *cert. denied*, 439 U.S. 831 (1978); *United States v. Scoratow*, 137 F. Supp. 620, 621-22 (W.D. Pa. 1956).

grand jury. Nevertheless, emphasizing that defendant's conduct was "unlike that in any other reported case where a conviction under § 1503 has resulted," the Court of Appeals reversed the conviction, reaffirming the general rule that "obstruction of a government agency's investigation" is insufficient to trigger Section 1503. *Id.*

While this case was pending, two other Circuits were faced with prosecutions under Section 1503 for false statements made to FBI agents. Their decisions are likewise consistent with this rule. In *United States v. Wood*, 6 F.3d 692 (10th Cir. 1993), the Court of Appeals reversed a conviction under Section 1503 for false statements to investigating agents of the FBI. The court recognized the possibility, as in *Brown*, that false statements to the FBI might "'arguably interfer[e] with some aspect of the administration of justice. . .'" It found, however, that "the nexus to the progress of a judicial proceeding is too attenuated and the statutory construction therefore too strained'" to be a violation of Section 1503. *Id.* at 696 (*quoting United States v. Walasek*, 527 F.2d 676, 679 (3d Cir. 1975)). After distinguishing many of the cases on which petitioner relies in this case, the court concluded that "defendant's unsworn exculpatory statements given in his own office to interviewing FBI agents did not have the natural and probable effect of impeding the due administration of justice in the sense required by 18 U.S.C. § 1503." *Id.* at 697.

Even the decision of the Court of Appeals for the Fourth Circuit in *United States v. Grubb,* 11 F.2d 426 (4th Cir. 1993), upholding a conviction under Section 1503 for false statements to an FBI agent, is consonant with the requirement of a nexus between the false or misleading conduct and the exercise by grand jury of its authority. In *Grubb*, the indictment alleged that "the Grand Jury was assisted in this investigation by Special Agents of the FBI

. . . ", *Id.* at 436 n. 15, and the evidence showed that the grand jury investigation was "being conducted through this FBI agent." *Id.* at 436. By contrast, the Court of Appeals below found that "[t]here [was] no evidence that a grand jury had authorized or directed the FBI investigation; nor [was] there evidence that the FBI agents had been subpoenaed to testify." Pet. App. 18a.[6]

Petitioner's effort to sidestep the requirement of a nexus between the "potential" witness and a judicial proceeding would dramatically expand the scope of Section 1503. Because "it is usually the task of the United States Attorney's office, with the help of such agencies as the FBI, to amass and coordinate evidence to be presented to the grand jury," *United States v. McComb*, 744 F.2d 555, 561 (7th Cir. 1984), FBI agents, as well as other government investigators, are *always* potential grand jury witnesses. And because the grand jury is free to receive virtually any probative evidence, *Costello v. United States*, 350 U.S. 359 (1956), including summary hearsay testimony by investigators and agents, *any* interference with the FBI's evidence-gathering function necessarily exerts a potential influence on the grand jury. If accepted, that argument might perhaps be broad enough to sweep Judge Aguilar's statements within Section 1503. But invoking Section 1503 merely because an investigative agent might, at some unspecified time, be called upon to convey the fruits of his investigation to the grand jury would sweep in virtually every false statement in the course of a law enforcement investigation.

What is more, because any person with whom the target of an investigation discusses pertinent facts may also

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[6] To the extent that *Grubb* is inconsistent with *Wood* and the decision below, respondent respectfully submits that it was wrongly decided.

be deemed a "potential" witness, petitioner's construction of Section 1503 would expand the scope of the statute to encompass virtually any false statement by a putative defendant to any person.[7] The consistent holdings of the courts construing Section 1503 make clear that such a result extends the statute far beyond its existing or intended scope. The expansion of the "omnibus clause" that petitioner urges is entirely unmoored to any suggestion that it is necessary to protect the legitimate functions of the grand jury or of law enforcement. False statements to FBI agents have long been punished under 18 U.S.C. § 1001;[8] and, since 1982, under appropriate circumstances, false statements to potential witnesses may also be charged under 18 U.S.C. § 1512.[9]

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[7] The requirement that the government prove that a defendant knows that a person is a potential witness would furnish scant protection, since the circumstances themselves render each person to whom a putative defendant speaks a "potential" witness.

[8] *See, e.g., United States v. Rodgers*, 466 U.S. 475 (1984); *United States v. Haggard*, 41 F.3d 1320 (9th Cir. 1994); *United States v. International Brotherhood of Teamsters*, 964 F.2d 1308 (2d Cir. 1992); *United States v. Levin*, 133 F. Supp. 88 (D. Colo. 1953).

[9] The record suggests instead that the government's resort to Section 1503 was nothing more than an exercise in artful pleading. Judge Aguilar was charged initially with violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), through a pattern of racketeering that allegedly included the false statements to the FBI agents. Although Section 1503 is a RICO predicate offense, *see* 18 U.S.C. § 1961(1), Section 1001 is not. *Ibid.* While the conduct at issue here could have been charged under Section 1001, such an allegation would not have buttressed the government's efforts to contrive a RICO allegation. Circumventing Congress' intent to *limit* the scope of the RICO statute, however, is a particularly poor reason to *expand* the scope of Section 1503.

2. *The Terms of the "Omnibus Clause" Do Not Extend the Scope of the Statute to False Statements to Potential Witnesses*

Acknowledging that its construction of Section 1503 is unsupported by prior decision or the specific prohibitions of Section 1503, petitioner relies instead on the broadest possible construction of the terms "corruptly . . . endeavors to influence" to reach the conduct alleged here. The government contends that false statements to a potential witness are covered by Section 1503 because they can have the "same effect" as other acts covered by the statute. Gov't Br. 21. Thus, according to petitioner, *any* act done with the requisite intent that has or might have the effect of "influenc[ing], obstruct[ing] or imped[ing] the due administration of justice" falls within the "omnibus clause." Gov't Br. 16-17, 19-21. It is impossible to reconcile this construction of the "omnibus clause" with the balance of Section 1503 or the statutory scheme of which it is a part.

The "omnibus clause" must be interpreted in light of the rest of the statute. *See Smith v. United States*, 113 S. Ct. 2050, 2056 (1993). Section 1503 contains two tiers or "branches," *see Pettibone*, 148 U.S. at 204-05, prohibitions of specific conduct followed by the omnibus or "residual" clause. *See e.g. United States v. Hernandez*, 730 F.2d 895, 898 (2d Cir. 1984); *United States v. Jeter*, 775 F.2d 670, 675 (6th Cir. 1985), *cert. denied*, 475 U.S. 1142 (1986). "[A] sensible and long-established maxim of construction limits the way we should understand" provisions, like the "omnibus clause," that round out a list of specific offenses. *Holder v. Hall*, 114 S. Ct. 2581, 2604 (1994) (Thomas, J., concurring). The principle of *ejusdem generis* dictates that "a general statutory term should be understood in light of the specific terms that surround it," *Hughey v. United States*, 495 U.S. 411, 419 (1990), and thus "should be understood

to refer to items belonging to the same class that is defined by the more specific terms in the list." *Holder*, 114 S. Ct. at 2604. The Ninth Circuit therefore correctly held that the "omnibus clause" must be interpreted in light of the specific offenses listed in Section 1503. Pet. App. 23a n.9.

When the "omnibus clause" is properly viewed in light of the specifically enumerated offenses, it becomes clear that its reach does not extend to false statements to potential witnesses. The enumerated offenses include:

> (a) attempting "to influence, intimidate, or impede any grand or petite juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate;"
>
> (b) injuring "any such grand or petite juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror;" and
>
> (c) injuring "any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties."

18 U.S.C. § 1503.

Most immediately apparent from this list is the absence of any reference to obstruction of witnesses. All others protected by the specific prohibitions in Section 1503 -- jurors, court officers and magistrates -- are responsible for administering justice. Witnesses cannot be said to administer justice, and "potential" witnesses are even farther removed.

Some courts have held that limiting the reach of the "omnibus clause" to acts similar in *type*, as the doctrine of *ejusdem generis* requires, rather than acts similar in *result*, would render the "omnibus clause" "superfluous." *See, e.g., United States v. Howard*, 569 F.2d 1331, 1333 (5th Cir.) (citing *United States v. Walasek*, 527 F.2d 676, 679 & n. 11 (3d Cir. 1975)), *cert. denied*, 439 U.S. 834 (1978).[10] But exactly the opposite is true.

If the "omnibus clause" is construed to include all acts that might adversely affect the administration of justice, it is the enumerated offenses in Section 1503 that are rendered superfluous. Moreover, so construed, the "omnibus clause" of Section 1503 obliterates the balance of the statutory scheme addressed to obstruction of justice.[11] For example, resisting a process server; resisting an extradition agent; influencing a juror in writing; theft of a record relating to the reversal of a judgment; picketing a courthouse; recording or observing jury deliberations; influencing a victim, witness or informant; or retaliating against a witness, victim or informant are all acts that would fall within the scope of the "omnibus clause" as interpreted by the government. Yet Congress has passed a specific

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[10] *Ejusdem generis* does *not* mean, and the Ninth Circuit did *not* hold, as the government implies, that the omnibus clause is "limit[ed] . . . to the specifically defined offenses in other clauses of Section 1503." Gov't Br. 27. Rather, as the Ninth Circuit held, the omnibus clause properly functions as a residual clause, bringing within the scope of the statute those acts that are similar in kind, such as an attorney's forgery of a court order to steal from his clients, *cf. United States v. London*, 714 F.2d 1558, 1566-67 (11th Cir. 1983), rather than in result.

[11] Section 1503 is an integral part of a thorough and precisely constructed corpus of seventeen obstruction statutes, *see* 18 U.S.C. § 1501 *et seq.*, apart from which it may not be read. See *Muniz v. Hoffman*, 422 U.S. 454, 468 (1975); *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974).

obstruction statute to address each of these acts individually.[12]

The rule of *ejusdem generis* is useful precisely because it prevents the "omnibus clause" from "swallowing up" the rest of the statute, as well as the statutory scheme of which it is an integral part. *See Peretz v. United States*, 501 U.S. 923, 955 (1991) (Scalia, J., dissenting). By contrast, in order to construe the "omnibus clause" broadly enough to reach Judge Aguilar's conduct, the government must dispense with any limiting principle that stops short of absorbing the whole statutory scheme.

Finally, even if in some circumstances Section 1503 might reach out to cover a prospective witness, a mere false statement is not one of those circumstances. The phrase "corruptly . . . endeavors to influence, obstruct or impede," on which the government relies, should not be construed in isolation, but rather with reference to the particular activities that the statute prevents. *See King v. St. Vincent's Hosp.*, 112 S. Ct. 570, 574 (1991) (citations omitted); *see also United States Nat'l Bank of Oregon v. Independent Ins. Agents, Inc.*, 113 S. Ct. 2173, 2182 (1993).[13] Both the

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[12] *See* 18 U.S.C. §§ 1501 (process servers); 1502 (extradition agent); 1504 (influencing a juror by writing); 1506 (theft or alteration of record or process); 1507 (picketing or parading); 1508 (recording or observing jury deliberations); 1512 (influencing witnesses, victims and informants); 1513 (retaliating against witness, victims and informants).

[13] In fact, standing alone, the phrase "corruptly . . . endeavors to influence, obstruct, or impede" may be unconstitutionally vague in that it does not provide sufficient notice that it prohibits false statements to a prospective witness and does not provide sufficient guidelines for law enforcement -- any act that a particular law enforcement officer perceives to be "perverted" or "depraved" or done to achieve some sort of advantage might be subject to punishment. *See* Pet. App. 22a-23a n.8 (finding the term "corruptly" vague on its face as applied to false statements to Congress under 18 U.S.C. § 1505) (citing *United States v. Poindexter*, 951 F.2d 369, 377-79 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 656 (1992)); *see also Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983).

first "branch" of Section 1503 and the "omnibus clause" itself list other specifically prohibited activities. In addition to punishing one who "corruptly . . . endeavors to influence, obstruct, or impede," the statute prohibits the use of "threats," "force," "threatening letter or communication," "intimida[tion]," and "injur[y]" to "person or property." 18 U.S.C. § 1503.

It is both logical and customary to give related meanings to words and phrases grouped together. *See Dole v. United Steelworkers*, 494 U.S. 26, 36 (1990) (explaining doctrine of *noscitur a sociis*). While this rule of construction is not "inescapable," it is "wisely applied" "in order to avoid the giving of unintended breadth to the Acts of Congress" where a phrase like "corruptly influence" is "capable of many meanings."[14] *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).

As the Ninth Circuit found, "false and misleading statements to the FBI" are "very different from the other types of activities enumerated in section 1503." Pet. App.

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[14] An endeavor to "corruptly influence" cannot mean simply any endeavor that is intended to obstruct the due administration of justice, as the government's analysis implies. Gov't Br. 16-19. The term "corruptly" may not be treated as "surplusage," particularly since it "describe[s] an element of a criminal offense." *Ratzlaf v. United States*, 114 S. Ct. 655, 659 (1994). It must have some meaning, if only "because otherwise the statute would criminalize all attempts to 'influence'" a grand jury, petit jury or a court, "an absurd result that the Congress could not have intended in enacting the statute." *United States v. Poindexter*, 951 F.2d 369, 377-78 (D.C. Cir. 1991) (interpreting nearly identical terms in 18 U.S.C. § 1505), *cert. denied*, 113 S. Ct. 656 (1992).

23a. All of the prohibited activities involve varying degrees of forceful persuasion. A simple false statement does not.[15]

B. The Amendment Of Section 1503, The Enactment Of Section 1512 And All Relevant Legislative History Demonstrate That Section 1503 Does Not Apply To The Conduct Charged

As we set forth above, Section 1503 never has encompassed, nor can it, in accordance with its terms, be stretched to encompass the conduct charged here. However broadly it might once have been construed, any doubts about that proposition were laid to rest by the enactment in 1982 of the Victim Witness Protection Act, Pub. L. No. 970291, 96 Stat. 1248 (1982) ("VWPA"). In the VWPA, Congress took two steps of critical importance to resolving the issue presented by the petitioner. First, in a new Section 1512, Congress substantially expanded the protections afforded to potential, current, or former witnesses. In particular, in Section 1512, Congress prohibited engaging in "misleading conduct" . . . "toward another person, with intent to . . . influence, delay, or prevent the testimony of any person in

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[15] As the Ninth Circuit noted in conclusion, even if the government's interpretation of Section 1503 were possible because of some ambiguity, "the more lenient construction is required." Pet. App. 24a-25a. This Court has long emphasized that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347 (1971) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). Thus, if any "reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history and motivating policies' of the statute," *Moskal v. United States*, 498 U.S. 103, 108 (1990), it should be construed narrowly. *See also United States v. Granderson*, 114 S. Ct. 1259, 1267 (1994).

an official proceeding."[16] Elsewhere in the VWPA, Congress defined "misleading conduct" to include "making a false statement." 18 U.S.C. § 1515(a)(3)(A).[17] As its plain terms suggest, in this new Section 1512, Congress addressed the conduct charged here. Simultaneously, Congress amended Section 1503 to delete *all* references to witnesses, placing all prohibited conduct towards witnesses formerly in Section 1503, together with other new protections for witnesses, in the new Section 1512.[18]

The lower courts later split over the question of whether the "omnibus clause" of Section 1503, the terms of which were not changed, continued to apply in any fashion

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[16] As enacted in 1982, Section 1512 provided in relevant part:

> (a) Whoever knowingly uses intimidation or physical force, threatens another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to --
>
> (1) influence the testimony of any person in an official proceeding
>
> * * *
>
> shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

18 U.S.C. § 1512(a)(1982) (currently 18 U.S.C. § 1512(b)(1)).

[17] Section 1515 provides in relevant part:

> (a) As used in sections 1512 and 1513 of this title and in this section --
>
> * * *
>
> (3) the term "misleading conduct" means --
>
> (A) knowingly making a false statement;

18 U.S.C. § 1515(a)(3)(A).

[18] The former text of Section 1503, as it stood prior to the enactment of the VWPA, is set out at Pet. App. 19a n.5.

to conduct concerning witnesses.[19] However, the plain terms of the statutes, the unambiguous legislative history, and accepted canons of statutory construction leave one proposition beyond peradventure: Congress most certainly did not intend that conduct expressly encompassed within Section 1512 could also be prosecuted -- if it ever could have been -- under the "omnibus clause" of Section 1503.

1. The Court Should Give Effect to Congressional Intent to Remove From Section 1503 All Conduct Addressed in Section 1512.

In 1982, Congress did all it could to carry out its plan to address all potentially obstructive conduct towards witnesses in Section 1512. In addition to removing any reference to witnesses from Section 1503, Congress expressly addressed an expanded array of obstructive conduct towards witnesses -- including the precise conduct charged here -- through Section 1512. There is ample support for the view that Congress intended to remove *all* obstruction relating to witnesses from the scope of Section 1503. The

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[19] *Compare United States v. Hernandez*, 730 F.2d 895, 899 (2d Cir. 1984) *with United States v. Lester*, 749 F.2d 1288, 1295-96 (9th Cir. 1984) *and United States v. Rovetuso*, 768 F.2d 809 (7th Cir. 1985), *cert. denied*, 474 U.S. 1076 (1986). The issue in these cases was whether forms of witness tampering that were *not* covered by Section 1512 might still be punished under Section 1503. Whether conduct that *is* expressly covered by Section 1512 can still be punished under Section 1503, which is the issue in this case, is a different question. At least two circuits have held that Section 1503 covers *all* types of witness-related obstruction, despite the enactment of Section 1512. *United States v. Kenny*, 973 F.2d 339, 342-43 (4th Cir. 1992); *United States v. Moody*, 977 F.2d 1420, 1424 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1348 (1993). Respondent respectfully suggests that these latter cases were wrongly decided for the reasons discussed.

Court, however, need not reach that issue. The enactment of the VWPA unmistakenably supports the view that Congress never intended to leave within the "omnibus clause" of Section 1503 conduct expressly addressed in Section 1512, including false statements to witnesses. The removal of all references to witnesses from Section 1503 and the inclusion within Section 1512 of the precise prohibition that petitioner attempts to infer from the "omnibus clause" of Section 1503 is compelling evidence of Congressional intent to address that conduct only within Section 1512.[20]

This is not, as petitioner misleadingly suggests, a question of "repeal by implication." It is, rather, a straightforward application of the principle, reaffirmed only recently by this Court, that courts may not ignore such direct and express congressional reorganization of a legislative scheme. *See United States v. Fausto*, 484 U.S. 439 (1988). The issue in *Fausto* was whether a non-veteran, excepted service federal employee could maintain an action for back pay connected with a suspension for misconduct in the United States Claims Court under the Tucker Act and the Back Pay Act, despite the subsequent passage of the Civil Service Reform Act of 1978 ("CSRA"). *Id.* at 440-43. Prior to enactment of the CSRA, the Claims Court had relied on a broad provision of the Back Pay Act to assert jurisdiction over back pay actions of employees like Fausto. *Id.* at 454. The CSRA, "'comprehensively overhauled the civil service system'" and provided detailed remedies for similar actions, but contained no provision for judicial or administrative review of claims by non-veteran excepted

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[20] As we set forth in Section I.A above, respondent submits that Section 1503 has never encompassed false statements to potential witnesses. The effect of the VWPA on the scope of Section 1503 is relevant only if the Court finds that this conduct might once have been charged under Section 1503, although it is undisputed that it never was.

service employees suspended for misconduct. *Id.* at 443 (citing *Lindahl v. OPM*, 470 U.S. 768, 773 (1985)).

The Court held that Congress' decision *not* to provide a remedy for such claims in the CSRA meant that the Back Pay Act no longer could be interpreted to give the Claims Court jurisdiction over those claims. *Id.* at 455. This holding came over the objection, repeated by the government here, Gov't Br. 25-28, that the doctrine of "repeal by implication" precluded a review of the settled interpretation of the Back Pay Act. The Court reasoned:

> Repeal by implication of an express statutory text is one thing; it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change. [] But repeal by implication of a legal disposition implied by a statutory text is something else. The courts frequently find Congress to have done this -- whenever, in fact, they interpret a statutory text in the light of surrounding texts that happen to have been subsequently enacted. . . All that we find to have been "repealed" by the CSRA is the judicial interpretation of the Back Pay Act. . .

Fausto, 484 U.S. at 453 (citations omitted).[21] In at least four distinct respects, the Congressional intent to limit the scope of Section 1503 is far more compelling than the circumstances presented in *Fausto*.

First, Congress did "specifically address language on the statute books that it wanted to change" by removing *all* references to witnesses from Section 1503. There was

[21] *See also Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1989) (courts should be "reluctant [] to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute.").

nothing "implied" or "implicit" about the amendment of Section 1503 and the enactment of Sections 1512 and 1515. The issue in this case is thus not *whether* Section 1503 was amended by the VWPA, but *what those amendments mean*.[22]

Second, both Section 1503 and Section 1512 are part of the same legislative scheme; the Court need not speculate about whether Congress understood the effect that the enactment of Section 1512 would have on Section 1503. Rather, as the interplay between the statutes and the legislative history (discussed below) plainly reflects, Congress intended to construct the new Section 1512 at least in part at the expense of the former scope of Section 1503.

Third, the conduct at issue is covered expressly by Section 1512; the Court need not reason from a failure to speak on the subject, as it did in *Fausto*, but instead can discern from the enactment of a specific provision addressing

[22] There is no reason to infer a contrary result from the fact that Congress did not amend or repeal the omnibus clause when it removed the specific references to witnesses from Section 1503. *Cf.* Gov't Br. 24-25. Prior to 1982, witnesses tampering was addressed in Section 1503 by the specific terms that Congress removed from that statute, not by the omnibus clause. None of the pre-1982 witness cases on which the government relies gives any indication that the omnibus clause, as opposed to the specific witness provisions, provided grounds for prosecution of the offense in question. Further, the omnibus clause plays an important role in the scheme of obstruction statutes after the 1982 amendment. It encompasses much conduct that is unrelated to witnesses or even to conduct covered by the other specific obstruction statutes. *See, e.g., United States v. London*, 714 F.2d 1558 (11th Cir. 1983) (forgery of court order); *United States v. Walasek*, 527 F.2d 676 (3d Cir. 1975) (destruction of subpoenaed records); *United States v. Jeter*, 775 F.2d 670 (6th Cir. 1985) (violation of grand jury secrecy), *cert. denied*, 475 U.S. 1142 (1986); *United States v. Griffin*, 589 F.2d 200 (5th Cir.) (false testimony), *cert. denied*, 444 U.S. 825 (1979).

the conduct in question how and where Congress wished to address the matter.

Finally, there is no directly relevant judicial interpretation to "repeal," as there was in *Fausto*. To the contrary, we need not ask this Court to reject any judicial interpretations applying Section 1503 to the conduct charged here -- although that result would be warranted under *Fausto* -- because *no* court ever applied Section 1503 to false statements to a potential witness prior to 1982.

In short, *Fausto* teaches that it is both desirable and proper to give effect to congressional intent by recognizing the limitations effected in one statute by later and more comprehensive legislation addressing the identical issue. It would be fairer to characterize petitioner's argument as "expansion by negative inference," than to label our claim as one based upon "repeal by implication."[23]

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[23] This case thus bears little resemblance to the two cases cited by the government as "parallel" on repeal by implication. *See* Gov't Br. 27 (citing *United States v. Noveck*, 273 U.S. 202 (1927); *Edwards v. United States*, 312 U.S. 473 (1941)). In *Noveck* the argument was that a tax statute partially repealed the general perjury statute as it applied to tax matters; and in *Edwards*, the argument was that a securities statute partially repealed the general mail fraud statute as it applied to securities. In neither case had Congress actually amended the more general statute by removing all language related to the area of coverage of the more specific statute, as Section 1503 was amended, nor were the statutes at issue in those cases part of a unified statutory scheme, as they are here. *Edwards* and *Noveck* are thus inapposite.

2. Legislative History of the VWPA Confirms that Congress Intended to Remove Witness Tampering From the Scope of Section 1503

The legislative history of the VWPA strongly supports our interpretation of Section 1503. During floor debate on the VWPA, Senator Heinz, a primary backer of the legislation, compared the Senate bill to the House bill, the latter of which was enacted as the VWPA: "The House version [of the VWPA] amends section 1503 so it will *make no mention of, and provide no protection to*, supenaed [sic] witnesses." 128 Cong. Rec. 26,810 (1982) (emphasis supplied). "By amending section 1503 in this way," the Senator continued, "the proposal will contribute to a clearer and less duplicative law." *Id.*

The government devotes three pages to an attempt to persuade the Court that Senator Heinz' remarks mean something other than what they say. *See* Gov't Br. 29-32 & n. 4. Petitioner notes that the Senate version of what became Section 1512 contained an "omnibus clause," which was, if anything, broader than the "omnibus clause" in Section 1503 and made no mention of witnesses. *Id.* at 29-30 & n. 4 (quoting Senate bill). From Senator Heinz' observation that this "omnibus clause" was "beyond the legitimate scope" of the VWPA and "duplicative of [o]bstruction of justice statutes already in the books," *id.* at 31, petitioner concludes that Congress was relying "on the continued applicability of Section 1503 as the basis for removing what would have been 'duplicative' coverage in Section 1512." *Id.* To the extent that the "omnibus clause" of Section 1503 may still extend to acts that are not covered by Section 1512 or the other specific obstruction statutes, we need not take issue.

The remainder of the government's argument, however, simply makes no sense. Its suggestion that

Congress intended the "omnibus clause" of Section 1503 to address conduct specifically covered by Section 1512 cannot be reconciled with Senator Heinz' comment that the proposed omnibus provision in Section 1512 was both "duplicative" of Section 1503 and "beyond the legitimate scope of this witness protection measure." If the proposed "omnibus clause" in Section 1512 concerned matters "beyond" the scope of the remainder of Section 1512, but was "duplicative" of the "omnibus clause" in Section 1503, then it follows that Senator Heinz likewise must have understood that the "omnibus clause" of Section 1503 was "beyond the [] scope" of witness protection. If so, it simply cannot be relied upon to address the conduct at issue here, which falls squarely within the "witness protection" provisions of Section 1512.

Petitioner suggests, apparently in the alternative, that by removing references to witnesses from Section 1503, Congress intended to remove only "specific duplication." Gov't Br. 31. That intent, according to petitioner "does not suggest that Congress intended to remove all witness-related offenses from the scope of Section 1503, or to limit in some other way the scope of the 'omnibus clause' of Section 1503." Gov't Br. 31-32.

If the government is correct, either Congress eliminated duplicative provisions from the specific provisions of Section 1503 but intended *sub silentio* to prohibit the same conduct through the "omnibus clause;" or, alternatively, that Congress eliminated "specific duplication" from all of Section 1503 but left other (presumably "general") duplication behind to reside in the "omnibus clause". Under this latter view, the "omnibus clause" of Section 1503 covers all conduct that is also covered by the specific provisions of Section 1512, except, apparently, for those provisions of Section 1512 that formerly resided in Section 1503. Petitioner's interpretation of Section 1503 thus fashions

either a wholly duplicative statute or a statute whose scope is so unclear that courts will forever after have to look to language that Congress *removed* in order to ascertain what *remains*.[24] That position is hard enough to articulate, much less to justify. It is anything but the "clearer and less duplicative law" that Senator Heinz described. 128 Cong. Rec. 26,810 (1982).[25]

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[24] If petitioner means by "specific duplication" to suggest that Congress intended to remove from Section 1503 conduct specifically addressed in Section 1512, the argument is unavailing. While that position might leave some residual scope for Section 1503 concerning witnesses, it surely does not encompass the conduct charged here, which is specifically addressed in Section 1512(b)(1).

[25] In enacting the VWPA, Congress took stock of what it understood to be the existing scope of Section 1503. The Judiciary Committee Report accompanying the Senate's version of the VWPA noted that certain obstruction statutes, including Section 1503, "relate to coercive acts intended to tamper with witnesses." S. Rep. No. 532, 97th Cong., 2d Sess., at 14 (1982). The Committee explained that Section 1503 requires:

> . . . a relatively high threshold of seriousness for commission of a crime. For instance, section 1503 requires corruption, threats or force . . . [and does not] proscribe conduct knowingly and maliciously hindering, delaying, preventing or dissuading testimony or reports to law enforcement officers. . . .
>
> . . . Testimony given to the ABA suggested that sometimes innocent acts, such as telephoning a victim to say hello, coming to his home, or even driving a motorcycle by, may be extremely effective in preventing a victim or witness from testifying. This type of activity is not covered by section 1503 which requires corruption, threats or force for an offense.

Id. at 14, 15.

The Judiciary Committee thus indicated that hindering, delaying, preventing or dissuading a witness from testifying, and even verbally

3. *The Subsequent Amendment of Section 1512 Confirms that Congress Intends to Cover Witness Tampering in Section 1512, Not Section 1503*

Congress again turned its attention to the obstruction statutes in 1988 to resolve the conflict among the circuits that had arisen over whether forms of non-coercive witness tampering left unaddressed in Section 1512 were prohibited by the "omnibus clause" of Section 1503. In so doing, it reaffirmed its intent to confine all issues relating to the obstruction of witnesses to Section 1512, especially conduct expressly covered by its specific prohibitions. As Congress added the phrase "corruptly persuades" to Section 1512 to address such non-coercive conduct formerly unaddressed by Section 1512, it stated:

> It is intended that culpable conduct that is not coercive or "misleading conduct" be prosecuted under 18 U.S.C. § 1512(b), rather than under the [omnibus] clause of 18 U.S.C. § 1503. [The amendment], therefore, will permit prosecution of such conduct in the Second Circuit, where such prosecutions cannot now be brought, and will in other circuits result in prosecutions being brought under 18 U.S.C. § 1512(b).

H.R. Rep. No. 100-169, 100th Cong., 1st Sess., at 12 (1987). This legislative history confirms what is obvious from the language of both the 1982 and the 1988

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harassing a witness do not amount to "corruptly endeavoring to influence" under Section 1503. Such a view would necessarily exclude the conduct alleged here.

amendments and Senator Heinz' statements: Since 1982, Section 1512 provides the exclusive avenue for the prosecution of all forms of witness tampering specifically addressed by its terms.[26]

II. SECTION 2232(c) DOES NOT PUNISH DISCLOSURE OF A WIRETAP APPLICATION OR AUTHORIZATION THAT HAS EXPIRED

Judge Aguilar was convicted under 18 U.S.C. § 2232(c) for disclosing the existence of a wiretap application that had expired eight months before and was never renewed. As the Ninth Circuit held, however, Section 2232(c) does not extend to the disclosure of an expired wiretap. Petitioner now asks this Court to reject the Ninth Circuit's sound interpretation of the statute and instead to construe it contrary to its plain terms, based upon an unexpressed purpose totally absent from the statute or its legislative history.

Section 2232(c) protects the secrecy of authorizations to intercept electronic communications while such

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[26] The 1988 amendment to Section 1512 also furnished support for the Ninth Circuit's ruling in another way. When Congress amended Section 1512 to cover the arguable gap remaining in its coverage due to the absence of a prohibition directed at certain kinds of non-coercive witness tampering, it spoke to the meaning of the term "corruptly . . . endeavors to influence." As noted above, all of the other forms of conduct prohibited by Section 1503 involve an element of persuasion. As the Ninth Circuit reasoned, by choosing the phrase "corrupt persuasion" to fill the hole, Congress confirmed that the nearly identical phrase "corruptly influence" in Section 1503, like all the other prohibited activities, must involve an element of persuasion. Pet. App. 21a-22a. Since false or misleading statements to a witness cannot fairly be characterized as "corrupt persuasion," the *en banc* court correctly concluded that Section 1503 does not cover such conduct. *Id.* at 22a-24a.

authorizations are in effect or while applications for authorization are pending. Once a wiretap has expired, or an application for authorization has been denied, Section 2232(c) no longer prohibits its disclosure. While it may be possible, of course, to conceive of a broader statute, or one protecting different interests, Congress did not enact one. Section 2232(c) simply does not reach Judge Aguilar's conduct. Petitioner cannot supply a reasoned interpretation of the statute, a single precedent, or any persuasive legislative history that would support its effort to apply Section 2232(c) to conduct that it does not proscribe.

A. Judge Aguilar Was Convicted Of Disclosing The Existence Of A Wiretap Application That Had Expired And Was Not Renewed

Judge Aguilar was convicted of disclosing a wiretap authorization that expired more than eight months before its disclosure. Both the record and all opinions below make that abundantly clear. *See* J.A. 108-110; *see also* Pet. App. 5a, 32a, 70a. Contrary to the petitioner's assertion, Gov't Br. 44, there is *no evidence* in the record that the April wiretap "was reauthorized and extended further." Although other wiretaps were authorized on Tham's phones, *see* Gov't Exh. 1B, there is *no evidence* that those further wiretaps were "extensions" pursuant to 18 U.S.C. § 2518(5) of the April wiretap; *no evidence* that Chapman was named as an interceptee of those wiretaps; and *no evidence* that Judge Aguilar had knowledge of these other wiretaps. In any event, Judge Aguilar was charged *only* with disclosing the April 1987 wiretap.

In short, Judge Aguilar was convicted of disclosing on February 9, 1988, a wiretap that had been authorized in April of 1987, that expired in May of 1987, and that was never renewed or extended.[27]

B. The Plain Language Of Section 2232(c) Is Inconsistent With The Interpretation The Government Proposes And The Interests It Seeks To Protect

"In determining the scope of a statute, [the Court] look[s] first look[s] to its language." *United States v. Turkette*, 452 U.S. 576, 580 (1981). "If the statutory language is unambiguous, in the absence of a 'clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *Id.* (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980)). The Court need look no farther than the language of Section 2232(c) to determine its scope.

18 U.S.C. § 2232(c) provides:

> Whoever, having knowledge that a Federal investigative or law enforcement officer has been authorized or has applied for authorization under chapter 119 to intercept a wire, oral, or electronic communication, *in*

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[27] Within ninety days after a wiretap authorization expires, the authorizing court is required to serve an inventory on the interceptee, informing that person of the existence of the wiretap, its effective dates and whether any information was intercepted. 18 U.S.C. § 2518(8)(d). On an *ex parte* showing of good cause, the authorizing judge may postpone the serving of this inventory. *Ibid.* On the date of the disclosure in this case, although the wiretap authorization had expired, the authorizing Judge had not yet served the Section 2518(8)(d) inventory on Chapman.

> *order to obstruct, impede, or prevent such* ***interception***, gives notice or attempts to give notice of ***the possible interception*** to any person shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 2232(c) (emphasis supplied). In the only reported opinion to construe this provision, the *en banc* court confirmed what is clear from the plain language of the statute itself: "[T]he purpose of the statute is to prevent interference with 'possible interception.'" Pet. App. 9a. Once a wiretap has expired or has been denied, the Ninth Circuit reasoned, there is no "possible interception" to disclose or to attempt to disclose. *Id.* at 8a-9a. The "plain language" of Section 2232(c) does not prohibit the conduct alleged in this case. The narrow purpose of the statute is further evidenced by the statute's intent requirement, which limits punishable disclosures to those undertaken with the intent to interfere with "such interception" of which the defendant "has knowledge." *Ibid.* Under the circumstances, the disclosure of an expired wiretap not only fails to violate the terms of the statute, it fails to implicate any interest protected by Section 2232(c).[28]

As the Ninth Circuit stated, "[t]he issue in this case is . . . whether the wiretap information [Judge Aguilar] disclose[d] was prohibited." *Id.* at 13a. This case most certainly does *not* "center[] on the intent element of the offense," as the government suggests. Gov't. Br. 38. In

[28] The fact that a different or successor wiretap may be in place at the time of the disclosure, and, indeed, might be impeded by a disclosure does not change the analysis. Congress chose in Section 2232(c) to punish only those disclosures undertaken with the purpose of impeding "such interception" of which the defendant has knowledge. That a disclosure of one authorization might interfere with other interceptions is a risk that Congress elected not to address.

contrast to its previous position before this Court and the Ninth Circuit, petitioner devotes the bulk of its attention to a largely irrelevant discussion of the intent requirement and the sufficiency of the evidence. *Id.* at 36-45. Only as an afterthought does petitioner coyly concede that "[t]he court of appeals may also have believed that respondent's conduct did not satisfy the disclosure element of the offense, on the ground that there was no 'possible interception' at the time the disclosure was made." *Id.* at 46.[29]

The reasoning of the Court of Appeals is not so difficult to follow, since it tracks the very terms of the statute. The first and most crucial step of the *en banc* court's analysis was that the interception disclosed must be "possible." Pet. App. 8a-9a, 13a-15a. The government's claim that "[t]he court of appeals believed that the term 'such interception' . . . precluded a conviction in this case" is but a half-truth. The Ninth Circuit looked to the knowledge and intent requirements to determine which "possible interceptions" may not lawfully be disclosed. Since the statute requires knowledge of an application or authorization and a specific intent to disclose or attempt to disclose "such interception" of which the defendant has knowledge, the Ninth Circuit concluded that only the disclosure of a "possible interception" of which the defendant has knowledge violates the statute. Judge Aguilar did not disclose a "possible interception" under Section 2232(c),

[29] The government's misdirected presentation of the Ninth Circuit's holding and the issue for review is puzzling in light of its Petition for Certiorari, which correctly noted that "the court of appeals interpreted the statute to require proof that the precise application or authorization of which the defendant had knowledge was still pending or unexpired at the time the defendant made the disclosure," Pet. 22, and did not indicate that the intent requirement was a matter of serious dispute, much less the "center[]" of dispute. *See Id.* at 20-25.

because the wiretap of which he had knowledge expired eight months before.[30]

The petitioner has yet to furnish a plausible alternative explanation accounting, as it must, for all the terms of the statute. *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992). In its Petition for Certiorari, the government simply read the phrase "possible interception" out of the statute, asserting instead that "there is no basis in the statutory language for the court of appeals' requirement that [] obstruction be *possible* at the time the disclosure was made." Pet. 23 (emphasis supplied). Even in its own argument, however, the petitioner was unable to avoid using the very language of the statute to express the requirement it inexplicably claimed to be unable to locate.

Having failed at subtraction, petitioner has turned in its brief on the merits to the process interpretation through addition. According to the petitioner now, "[s]o long as the defendant *believed* it was 'possible' that an operational wiretap resulted or would result from the application of which he had knowledge at the time he made the disclosure, the disclosure element is satisfied." Gov't Br. 46 (emphasis added). This interpretation suffers from the same flaw as petitioner's earlier efforts -- it is not grounded in the terms of the statute. Section 2232(c) does not punish giving notice or attempting to give notice of an "interception the defendant

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[30] The government properly abandoned the contention it previously advanced in its Petition for Certiorari that the Ninth Circuit's holding means "the statute requires proof that the defendant be shown to have succeeded in obstructing the interception of a wire communication." Pet. 23. There is no dispute that Section 2232(c) punishes "attempts to give notice of [a] possible interception." 18 U.S.C. § 2232(c). "The issue in this case is not whether Judge Aguilar attempted to disclose prohibited wiretap information, but whether the wiretap information he did disclose was prohibited." Pet. App. 13a.

believed to be possible;" it punishes notice or attempted notice of a "possible interception." 18 U.S.C. § 2232(c). The character of the interception is not relevant to the defendant's mental state, but to the *actus reus*.

It is precisely this fact that distinguishes this case from *United States v. Russell*, 255 U.S. 138 (1921), in which this Court held that a prosecution under the statutory predecessor to Section 1503 was not precluded by the failure of an indictment to allege that the person who was the object of an impermissible approach by the defendant had been selected or sworn as a juror. Focusing on the term "endeavor," this Court held that the defendant had the necessary intent, even if he could not achieve his goal. *Id.* at 143. Petitioner reasons that because the terms "in order to" in Section 2232(c) describes an intent requirement as broad as the term "endeavor," "the defendant can be found to have acted with the requisite intent even if he could not achieve his goal." Gov't Br. 40 (footnote omitted). As the Court of Appeals explained, however, Judge Aguilar's state of mind is simply not relevant. Pet. App. 13a. The term "possible" does not modify the notice that is given or defendant's state of mind. Rather, it defines and thus limits the class of interceptions that may not be disclosed without violating the statute. This court's decision in *Russell* cannot be stretched far enough span the distance between the statute Congress enacted and the conduct the government seeks to punish.[31]

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[31] The two panel members who dissented from the *en banc* court's holding likewise focused solely on the question of intent, to the exclusion of the remaining terms of the statute. The dissenters asserted that the *actus reus* is complete if the defendant "attempt[s] to warn someone *that an interception* of that person's telephone communications *is possible*." Pet. App. 26a. But Section 2232(c) does not punish "giving notice or attempting to give notice *that interception is possible;*" it punishes one who "gives notice or attempts to give notice of *the possible interception*."

The government's resort to legislative history fares no better. In support of the argument that Section 2232(c) should be applied to expired wiretaps, the government relies on a single word in a Senate Report on the Electronic Communications Privacy Act of 1986, of which the wiretap disclosure statute formed but a very small part. *See* S. Rep. No. 541, 99th Cong., 1st Sess. 1, 34 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3588; Gov't Br. 41. The Senate Report, in summarizing the sense of the statute, notes that "[t]he defendant must engage in conduct of giving notice of the possible interception to any person who *was* or is the target of the interception." *Ibid.* (emphasis supplied). From the use of the term "was," the government contends that Section 2232(c) was intended to reach expired wiretaps. Gov't Br. 41.

As the *en banc* court concluded, resort to this legislative history is not appropriate, because "the language of the statute clearly expresses the congressional intent." Pet. App. 11a; *Blum v. Stenson*, 465 U.S. 886, 896 (1984) (only if the statutory language is unclear may a court look to legislative history to determine its intent). Moreover, the Ninth Circuit's interpretation of the language of the statute is consistent, and the government's proposed interpretation inconsistent, "with the purpose of the Electronic Communications Act, as expressed in the Senate Report, which is 'to protect against the unauthorized interception of electronic communications,' so as to further 'guard against the arbitrary use of Government power to maintain surveillance over citizens . . .'" Pet. App. 11a (*citing* S.

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18 U.S.C. § 2232(c). In the same fashion as petitioners, the dissenters simply cannot get from here to there without redrafting the statute.

Rep. No. 541, 99th Cong., 1st Sess. 1, 34 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3555).[32]

Lacking a plausible interpretation of the statute to support its position, petitioner is left to contend that the result compelled by the terms of the statute would constitute a "windfall defense." Gov't Br. 47. Its argument, however, is nothing more than an expression of frustration at the terms of a statute that it finds too narrow to meet its needs. It is equally possible to derive a list of "windfall defense[s]" from the terms of the intent requirement of Section 2232(c), which is the cornerstone of the petitioner's position. An individual who discloses an ongoing wiretap for the purpose of undermining *another* interception (or, alternatively, for the purpose of interfering with an ongoing criminal investigation or disseminating false information), for example, would likewise "escape conviction," Gov't Br. 47, since Section 2232(c) punishes only those disclosures undertaken for the purpose of interfering with "such interception" of which a person has knowledge. While these limitations may not comport with the government's preference, they nonetheless reflect a clearly expressed Congressional purpose to address only the risks to a planned or ongoing wiretap from disclosure of the authorization for that wiretap itself. Petitioner may wish that Congress enacted a broader statute, or one designed to protect different interests, but its

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[32] A careful reading of the sentence from the Senate Report on which the government relies suggests that it does little to advance petitioner's cause. The most that can be said about this sentence is that it represents a sloppy effort to capture the terms of Section 2232(c). It unarguably describes a statute different than the provision Congress adopted. The statute is plainly *not* limited -- as the language in the Senate Report suggests -- only to disclosures made to the "target of the interception." Rather, as all parties agree, the statute reaches disclosures made to *anyone* with the intent to impede the known interception.

arguments based on such wishful thinking shed no light on the meaning of Section 2232(c).[33]

C. The First Amendment Precludes Petitioner's Interpretation Of Section 2232(c)

This Court has made clear time and again that where the interests of the First Amendment and the government collide, the government bears the burden of demonstrating a compelling "state interest of the highest order" before it may punish the disclosure of information. *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979). It is also well-established that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Communications Workers v. Beck*, 487 U.S. 735, 762 (1988). By seeking to extend the statute's

[33] The government also worries that if the Court were to hold that only disclosure or attempted disclosure of a "possible interception" constitutes a violation of the statute, a defendant would be able to "escape conviction" if the wiretap equipment malfunctioned or if the interceptee simply did not use the phone line. Gov't Br. 47. However, it is apparent on the face of the statute that Congress was concerned with legal possibility, not factual possibility. A wiretap is always mechanically possible. But the knowledge and intent requirements of Section 2232(c) demonstrate that authorized wiretaps and pending applications for wiretaps are "possible" interceptions protected by the statute, whether or not they are operating mechanically, because they are legally "possible." The holding of the *en banc* court would not preclude a prosecution under the circumstances proposed by the petitioner; and, in any event, these hypothetical circumstances are from those presented for decision in this case.

prohibitions against disclosure indefinitely, long after any interest protected by Section 2232(c) may be jeopardized, petitioner's construction of the statute would encompass a "substantial amount of constitutionally protected conduct," Pet. App. 12a, without identifying any countervailing interest that warrants that result. *Id.* at 11a. Both the First Amendment and this fundamental rule of construction counsel against petitioner's interpretation.[34]

Faced with the burden of identifying within Section 2232(c) a compelling government interest warranting a prohibition against disclosure of expired wiretaps, the petitioner has tried on a number of hats before finding

[34] The Court has specifically reserved the question of whether the First Amendment permits the criminal punishment of "one who secures . . . information by illegal means and thereafter divulges it." *Landmark Communications, Inc. v. United States*, 435 U.S. 829, 837 (1978). The government asserts that it may, relying on *Snepp v. United States*, 444 U.S. 507, 511 & n.6 (1980) and Fed. R. Crim. P. 6(e). Gov't Br. 48.

That issue, however, is nowhere present in this case. Contrary to the petitioner's insinuations this is not a case in which the defendant was found to have disclosed information received in his official capacity. *Ibid.* As the government has elsewhere acknowledged, Pet. App. 43a, 87a, 91a, Judge Aguilar's suspicions about electronic surveillance were founded at least in substantial part on the fact that the government chose to conduct public surveillance of Chapman from a car parked in front of Judge Aguilar's house. Concerned about the very issue that petitioner raises now, Judge Aguilar requested at trial an instruction that would have required the jury to find that he had disclosed knowledge gained from "confidential information, information derived from the judges employment." J.A. 127. Petitioner, however, successfully *opposed* this instruction, later arguing that the nature or source of Judge Aguilar's knowledge was "irrelevant." *Id.*; Brief for the United States of America (9th Cir. Aug. 9, 1991), at 38. Having expressly eschewed this doctrine at trial, and having relied before the jury on information that cannot conceivably be characterized as "confidential," *see* J.A. 112-116, it is particularly unseemly for petitioner to assert a contrary position before this Court.

something that it hopes will fit. Before the Ninth Circuit, the government argued that it had a compelling interest in protecting law enforcement interests generally or in future efforts at electronic surveillance. *See* Brief for the United States of America (9th Cir. Aug. 9, 1991), at 38-39; *see also* Pet. App. 39a. Recognizing that Section 2232(c) does not even purport to protect these interests -- since by its terms it protects only attempts to interfere with the particular interception that has been disclosed -- the government retreated from that argument in its Petition for Certiorari. Instead, it argued there that the government has a compelling interest in the protection of the secrecy of extensions and re-authorizations of wiretaps. Pet. 22.

Even if the terms "possible interception" were so construed, however, the interests protected by Section 2232(c) would lapse when the extensions or reauthorizations themselves expired. Nothing in this construction assists in identifying a government interest in an indefinite prohibition against disclosure, nor would it furnish a basis for applying the statute to the facts of this case, since there is *no* evidence that the wiretap was extended or re-authorized. Pet. App. 5a; *see also* Part II.A, *supra*.[35]

In its most recent posture, petitioner now focuses on the intent element of the offense, suggesting that so long as a defendant undertakes a disclosure with the purpose of impeding an existing wiretap, any First Amendment concerns are obviated. Gov't Br. 48. As with its arguments based on

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[35] Petitioner now concedes that a "reauthorization" of a wiretap would in any event be relevant only if the defendant had knowledge of the "reauthorization" at the time of the disclosure, which petitioner does not allege. Gov't. Br. 44 & n.11. A defendant who had knowledge of the "reauthorization" would have knowledge of an unexpired wiretap and therefore indisputably would be covered by the statute. The issue is the government's interest in preventing the disclosure of knowledge of an expired wiretap absent further extensions or knowledge thereof.

statutory construction, petitioner puts more weight on the intent element of Section 2232(c) than it may safely carry. If petitioner's argument is that a defendant's *purpose* to defeat a valid governmental interest is sufficient, it has simply missed the point. Under the balancing test repeatedly applied by the Court, petitioner must point to the existence of a compelling government interest; it cannot satisfy that burden by reference to the interests a putative defendant may mistakenly believe to be implicated by his conduct.

Just as important, petitioner's emphasis on intent, distinguishing disclosures that may be punished from those that may not be based upon their purpose, turns the First Amendment on its head. Preventing expressions designed to challenge government conduct is neither a legitimate nor compelling interest; it is precisely such anti-government expression that "l[ies] at the core of the First Amendment." *Butterworth v. Smith*, 494 U.S. 624, 632 (1990).

Despite its repeated efforts, the government cannot identify an interest within the scope of Section 2232(c) that would warrant punishing the disclosure of wiretaps that have long since expired. Its utter failure comports with common sense. Judge Aguilar's disclosure of a wiretap that had expired eight months before could not and did not jeopardize the wiretap itself, which is the only interest protected by Section 2332(c). The Ninth Circuit was on solid ground when it refused to embrace a gratuitous Constitutional confrontation by broadly construing Section 2232(c).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-270

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT P. AGUILAR

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent's brief narrows the scope of disagreement regarding the obstruction of justice statute, 18 U.S.C. 1503. Respondent agrees (Resp. Br. 12-13) that, at least as the case comes to this Court, it must be assumed that there was a pending grand jury proceeding and that respondent knew of that proceeding. The dispute therefore concerns only the third element of the offense: whether respondent's conduct constituted an endeavor "corruptly * * * to influence, obstruct, or impede[] the due administration of justice." 18 U.S.C. 1503. Like the court of appeals, respondent does not dispute that his false statements to the FBI agents constituted an endeavor to obstruct the grand jury investigation, in the ordinary sense of those terms. Instead, respondent advances three distinct and

conflicting limitations that he believes should be judicially imposed on Section 1503, in contravention of the plain language of the statute. Each of them, however, would create inexplicable anomalies and lacunae in the coverage of Section 1503; each of them is inconsistent with the course of judicial decisions interpreting the statute; and each of them would eliminate "core" cases of obstruction of justice that have always been thought to be covered by the statute. Each of respondent's alternative interpretations should therefore be rejected.

a. Respondent first argues that a defendant's conduct cannot constitute obstruction of justice unless there is a "direct nexus between the conduct alleged to be criminal and the lawful exercise of the grand jury's authority." Resp. Br. 14-15.

If respondent's "direct nexus" requirement means that the defendant's conduct must have some connection to the proceeding sought to be obstructed, we have no disagreement with that principle. The connection is ordinarily supplied—and was clearly supplied in this case—by the requirements that the defendant "have knowledge or notice or information of the pendency of [the] proceeding[]," see *Pettibone* v. *United States*, 148 U.S. 197, 205 (1893), and that the defendant be shown to have "endeavor[ed] * * * to * * * obstruct" the proceeding. Since a defendant rarely would endeavor to obstruct a proceeding by using some means that has no connection to it (say, a magical incantation), no further inquiry into the "directness" of the "nexus" is required.[1] In this case, respondent chose a means to carry

[1] The cases cited by respondent (Resp. Br. 15 & n.5) for the proposition that "[t]he courts have rebuffed efforts to shoehorn within Section 1503 conduct that does not implicate the exercise by the grand jury of its authority to compel the truthful testimony of witnesses or the production of documents" do not support that proposition. Instead, they make clear that the "connection" between the conduct and the pending proceeding is provided by the requirements that there be a pending proceeding, that the defendant have notice of it, and that he endeavor to obstruct it. Indeed, three of the four cases involved the question whether there was a pending proceeding. See *United States* v. *Brown*, 688 F.2d 596, 598 (9th Cir. 1982) (interference with execution of a search warrant "not aimed at interfering with a pending judicial proceeding" since it took place "wholly outside the context of an ongoing judicial or quasi-judicial proceeding"); *United States* v. *Simmons*, 591 F.2d 206, 208 (3d Cir. 1979) (stating that "the issue here is at what point does an investigation by law enforcement officers cross the threshold to become a pending grand jury investigation for purposes of [Section 1503]," and holding that the line was crossed when the first grand jury subpoenas were issued); *United States* v. *Scoratow*, 137 F. Supp. 620, 621-622 (W.D. Pa. 1956) (conduct must be "in relation to a proceeding pending in the federal courts * * * [a]nd a proceeding is not pending in court at least until a complaint has been filed"). In the other case, *United States* v. *Fayer*, 573 F.2d 741, 745 (2d Cir.), cert. denied, 439 U.S. 831 (1978), the court noted that while advice to a witness not to talk to an FBI agent would merely relate to an investigation by the FBI, advice to a witness "not to testify before the grand jury" could constitute obstruction of justice under the omnibus clause.

out his endeavor (making false statements to investigating agents that he believed would be reported to the grand jury) that was closely connected to the grand jury investigation and that, if successful, would have impeded and obstructed the grand jury's work. Respondent's conduct therefore had the necessary connection to the grand jury investigation to support his conviction.

If respondent intends his "direct nexus" test to require more than that kind of connection to the proceeding sought to be obstructed, however, that test must be rejected. It has no judicial support; contrary to respondent's contention (Resp. Br. 14-15) that "every

single court to construe Section 1503 in this setting has required a direct nexus," no court construing Section 1503 has *ever* used the term "direct nexus" in connection with the statute.[2] Nor does anything in the language of the omnibus clause suggest such a qualification, explain how "directness" should be measured in this context, or clarify how "direct" an endeavor to obstruct must be before it can be found to be a violation.

Respondent addresses those issues by stating that the term "direct nexus" means that the conduct charged under Section 1503 must "implicate the exercise by the grand jury of its authority to compel the truthful testimony of witnesses or the production of documents." Resp. Br. 15. The conduct at issue in this case, however, "implicate[s]" that "authority" in ways that are analogous to—and often much clearer than—the conduct at issue in many other contexts to which Section 1503 applies.

Thus, as we explain in our opening brief, courts have uniformly held that the alteration or forgery of documents that will be presented to a trial or grand jury constitutes obstruction of justice. See U.S. Br. 19 (citing cases). Such conduct is functionally equivalent

[2] Courts have occasionally used the term "nexus" in discussing the scope of Section 1503, although without the qualification "direct." See *United States* v. *Walasek*, 527 F.2d 676, 679 (3d Cir. 1975); *United States* v. *Thomas*, 916 F.2d 647, 652 (11th Cir. 1990). As argued above, we agree that the statute requires a connection, or "nexus," between the defendant's conduct and the grand jury, and such a nexus was shown in this case. Compare *United States* v. *Brand*, 775 F.2d 1460, 1465 (11th Cir. 1985) (statute proscribes conduct that "produces or *which is capable of producing an effect* that prevents justice from being duly administered"); *United States* v. *Wood*, 6 F.3d 692, 700 (10th Cir. 1993) (Tacha, J., dissenting) (same).

to respondent's conduct, since the alteration of documents has exactly the same effect as false statements to a prospective witness: bringing false information before the grand jury and hiding the truth. In addition, courts have found numerous other forms of conduct—all of which are no more "direct" than the conduct at issue here—to fall within the prohibitions of the omnibus clause of the statute. See, *e.g.*, *United States* v. *Mullins*, 22 F.3d 1365, 1367-1368 (6th Cir. 1994) (inducing co-employee to alter records that would be turned over in response to subpoena); *United States* v. *Barfield*, 999 F.2d 1520, 1522, 1524 (11th Cir. 1993) (witness provided false information to attorney for defendant, so that witness's own testimony would be impeached); *United States* v. *Lench*, 806 F.2d 1443, 1444 (9th Cir. 1986) (concealment of documents subject to subpoena); *United States* v. *Davila*, 704 F.2d 749, 752 (5th Cir. 1983) (defendants forged exculpatory documents and gave them to their attorney, knowing they would be turned over to government during their trial); *Knight* v. *United States*, 310 F.2d 305, 307 (5th Cir. 1962) (defendant planted illegal bottle of liquor on premises of witness against him).

The line that respondent proposes fails to distinguish this case from many instances in which the omnibus clause is clearly applicable, and it would inject substantial uncertainty into what have been routine Section 1503 prosecutions. Moreover, the omnibus clause "was drafted with an eye to 'the variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined.'" *United States* v. *Griffin*, 589 F.2d 200, 206-207 (5th Cir.) (quoting *Anderson* v. *United States*, 215 F.2d 84, 88 (6th Cir.), cert. denied, 348 U.S. 888 (1954)), cert. denied, 444 U.S. 825 (1979). See also S. Rep. No. 532, 97th Cong., 2d Sess.

18 (1982). To impose an artificial and ill-defined limit on the scope of the omnibus clause would be at odds with that purpose.

b. Respondent next proposes that the principle of *ejusdem generis* should be applied in this case to limit the scope of the omnibus clause to offenses that do not involve witnesses. Resp. Br. 19-20. Respondent's argument is wrong because the principle of *ejusdem generis* (and its close relative, the maxim of *noscitur a sociis*) has no application to the omnibus clause and, even if it did, the statute would still cover respondent's case.

The courts of appeals that have addressed the issue have overwhelmingly refused to apply the *ejusdem generis* maxim to the omnibus clause of Section 1503.[3]

[3] Indeed, it appears that the court below (see Pet. App. 23a & n.9) is the *only* court to apply the *ejusdem generis* maxim to the omnibus clause of Section 1503. The Eleventh, Fifth, Third, and Second Circuits have flatly refused to do so. See, *e.g.*, *United States* v. *London*, 714 F.2d 1558, 1566-1567 (11th Cir. 1983); *United States* v. *Howard*, 569 F.2d 1331, 1333 (5th Cir.), cert. denied, 439 U.S. 834 (1978); *United States* v. *Walasek*, 527 F.2d at 679; *United States* v. *Cohn*, 452 F.2d 881, 883-884 (2d Cir. 1971) (citing *United States* v. *Alo*, 439 F.2d 751, 753-754 (2d Cir.) (18 U.S.C. 1505), cert. denied, 404 U.S. 850 (1971)), cert. denied, 405 U.S. 975 (1972). The Fourth Circuit appears to have taken a similar position. See *United States* v. *Kenny*, 973 F.2d 339, 343 (4th Cir. 1992). Although the Sixth Circuit at one time appeared to apply the *ejusdem generis* principle to the omnibus clause of Section 1503, see *United States* v. *Essex*, 407 F.2d 214, 218 (6th Cir. 1969), it has repeatedly distinguished the case in which it did so and has since declined to apply the rule in other contexts. See *United States* v. *Jeter*, 775 F.2d 670, 676-677 (6th Cir. 1985), cert. denied, 475 U.S. 1142 (1986); *United States* v. *Faudman*, 640 F.2d 20, 22-23 (6th Cir. 1981). Before this case, the Ninth Circuit itself had also refused to apply *ejusdem generis* to the omnibus clause. See, *e.g.*, *United States* v. *Lester*, 749 F.2d 1288, 1293 n.3 (9th Cir. 1984); *United States* v. *Rasheed*, 663 F.2d 843, 851-852 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982).

The prerequisites for application of that maxim are not present here. Under its standard formulation, *ejusdem generis* stands for the principle that "where general words follow an enumeration of specific items, the general words are read as applying only to other items akin to those specifically enumerated." *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 588 (1980). The principle can be useful where a statute contains a list of words, usually followed by a general or collective term, to which a particular statutory command is applicable. This Court's cases have applied the principle exclusively in that context.[4] Indeed, even the recent cases in which the *ejusdem generis* principle has been *un*successfully

[4] A few examples follow, in each of which the term to which the principle was to be applied is italicized: *Hughey* v. *United States*, 495 U.S. 411, 417, 419 (1990) ("the amount of the loss sustained by any victim * * *, the financial resources of the defendant, the financial needs and earning ability of the defendant * * *, and *such other factors as the court deems appropriate*"); *Breininger* v. *Sheet Metal Workers*, 493 U.S. 67, 90, 91-92 (1989) ("fin[e], suspen[d], expe[l], or *otherwise disciplin[e]*"); *Garcia* v. *United States*, 469 U.S. 70, 72, 74 (1984) ("*mail matter* or * * * money or other property"); *Third National Bank in Nashville* v. *Impac Limited, Inc.*, 432 U.S. 312, 313 n.1, 322-323 (1977) ("attachment, *injunction*, or execution"). The maxim of *noscitur a sociis* has been applied only in the same context, as the following cases make clear (the terms to which the doctrine was applied are in italics): *Gustafson* v. *Alloyd Co.*, No. 93-404 (Feb. 28, 1995), slip op. 11, 12-13 ("prospectus, notice, circular, advertisement, letter, or *communication*"); *Dole* v. *United Steelworkers*, 494 U.S. 26, 34, 36 (1990) ("a written report form, application form, schedule, questionnaire, *reporting or recordkeeping requirement*, collection of information requirement, or other similar method calling for the collection of information"); *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 305, 307 (1961) ("exploration, *discovery*, or prospecting").

urged on the Court involve the interpretation of a general term found in a list of specific terms in a statute.[5]

By contrast, the three separate clauses of Section 1503 do not constitute an "enumeration of specific items," and the omnibus clause of Section 1503 is not one term among others to which a general statutory command applies. Instead, it is one of three distinct prohibitions in Section 1503. The first prohibits "influenc[ing], intimidat[ing], or imped[ing]" jurors or court officers "in

[5] The cases in which the Court has declined to apply the principle include the following, in which the italicized phrase indicates the terms assertedly governed by the *ejusdem generis* principle: *Holder* v. *Hall*, 114 S. Ct. 2581, 2591, 2604 (1994) (Thomas, J., concurring in the judgment) ("voting qualification or prerequisite to voting or *standard, practice, or procedure*"); *PUD No. 1 of Jefferson County* v. *Washington Department of Ecology*, 114 S. Ct. 1900, 1916, 1917 (1994) (Thomas, J., dissenting) (conditions may be imposed to ensure compliance with "applicable effluent limitations and other limitations, * * * prohibition[s], effluent standard[s], or pretreatment standard[s] * * * [or] *any other appropriate requirement of State law*"); *Norfolk & Western Ry.* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117, 127, 129 (1991) ("the antitrust laws and * * * *all other law*"); *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36, 39, 44 n.5 (1983) ("coal and *other minerals*"); *Director, OWCP* v. *Perini North River Associates*, 459 U.S. 297, 327 (1983) (Stevens, J., dissenting) ("*any person engaged in maritime employment*, including any longshoreman * * * and any harborworker"); *United States* v. *Turkette*, 452 U.S. 576, 578 n.2, 581 (1981) ("any individual, partnership, corporation, association, or other legal entity, and *any union or group of individuals associated in fact although not a legal entity*"); *Harrison* v. *PPG Indus., Inc.*, 446 U.S. at 580 n.1, 587-589 ("Administrator's action in approving or promulgating any implementation plan [under specified provisions of the statute in issue] or his action under [another statutory provision] or under regulations thereunder, or *any other final action of the Administrator*").

the discharge of [their] duty," while the second prohibits "injur[ing]" jurors for their jury service or court officers for the "performance of [their] official duties." 18 U.S.C. 1503. Except for the term "Whoever" with which the statute begins and the penalty provision with which it ends, the omnibus clause stands entirely on its own. All three prohibitions in Section 1503 are directed at obstruction of justice. But, aside from the fact that they are aimed at that result, they have little else in common. There is no basis for artificially limiting the omnibus clause to the scope of the earlier prohibitions, and this Court has never applied the *ejusdem generis* principle in a similar context.

In any event, the *ejusdem generis* principle has no application "when the whole context dictates a different conclusion," *Norfolk & Western Ry.* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1991), and "it may not be used to defeat the obvious purpose of legislation," *Gooch* v. *United States*, 297 U.S. 124, 128 (1936). As noted above, the purpose of the omnibus clause of Section 1503 is to prohibit obstruction of justice, by whatever means employed. To impose artificial limits on the scope of the omnibus clause, unrelated to the meaning of the terms of that clause, would defeat that purpose. We have cited examples above that establish the broad scope of Section 1503. See also U.S. Br. 28-29 (omnibus clause still applies to witness-related offenses). But respondent's own examples and suggested limitations make the same point.

Thus, respondent argues (Resp. Br. 20) that the omnibus clause of Section 1503 should not be applied to witness-related offenses, but only to offenses involving the individuals mentioned in the earlier clauses of Section 1503—jurors and court officers. We explain at some length in our opening brief that any such limitation

has no basis in the legislative history of the enactment or amendment of 18 U.S.C. 1512, which provides both narrower and broader protection to witnesses than does the omnibus clause of Section 1503.[6] See U.S. Br. 22-35. Nor does any such limitation have any basis in the terms of the omnibus clause, which plainly extend beyond the specific offenses mentioned earlier in Section 1503 and which provide no basis whatever for distinguishing between witness-related and non-witness-related endeavors to obstruct justice.[7] Indeed, even respondent's

[6] Respondent argues that the omnibus clause, if interpreted in accordance with its plain language, will "absorb[] the whole statutory scheme" of obstruction offenses. Resp. Br. 22. That contention is wrong, for three reasons. First, most of the other obstruction offenses involve different elements of proof and will inevitably cover offenses not covered by Section 1503. For example, 18 U.S.C. 1512 does not require proof that a proceeding was pending and does not require proof that the anticipated proceeding was federal, rather than state; Section 1503 requires proof of both of those facts. Second, none of the other obstruction offenses includes an omnibus clause. As we explain in our opening brief with respect to Section 1512, see U.S. Br. 31, omnibus clauses were not necessary in those statutes precisely because the omnibus clause in Section 1503 was sufficient to fill in any gaps in the statutory scheme. Third, it is a natural feature of a "gap-filling" criminal statute that it will overlap with more specific criminal prohibitions, and respondent does not explain how that result could be avoided.

[7] Respondent asserts that our position "implies" that the term "corruptly" is mere "surplusage." Resp. Br. 23 n.14. That is not correct. For example, truthful testimony before a grand jury could certainly be described as an effort to "influence" the grand jury, but it would not be an effort to exert "corrupt[] influence." Respondent also—hesitantly—states that the omnibus clause "may be unconstitutionally vague," Resp. Br. 22 n.13, and cites *United States* v. *Poindexter*, 951 F.2d 369, 377-379 (D.C. Cir. 1991), cert. denied, 113 S. Ct. 656 (1992), in support of that statement. No court has ever held that the omnibus clause of Section 1503 is unconstitutionally vague. Although the *Poindexter* court reached that conclusion (mistakenly, in our view) with respect to the omnibus clause of 18 U.S.C. 1505, that court expressly distinguished Section 1503 in that regard. See 951 F.2d at 385.

own example makes the same point.[8]

The broader point is that "the most natural construction of the [omnibus] clause is that it prohibits acts that are *similar in result, rather than manner*, to the conduct described in the first part of the statute." *United States* v. *Howard*, 569 F.2d 1331, 1333 (5th Cir.), cert. denied, 439 U.S. 834 (1978) (emphasis added). There is no reason to shield respondent's conduct, which undoubtedly falls within the plain language of the omnibus clause, merely because it does not also fall within the terms of the other prohibitions in Section 1503.

c. Respondent finally proposes (Resp. Br. 22) that, "even if in some circumstances Section 1503 might reach

[8] Respondent cites (Resp. Br. 21 n.10) *United States* v. *London*, 714 F.2d at 1566-1567, as a case that is "similar in kind" to those covered by the first two clauses in Section 1503. In *London*, an attorney was prosecuted under the omnibus clause of Section 1503 for altering a judgment, which in fact ran in favor of his clients, to make it appear that it was entered against them. The attorney then collected the purported "judgment" from the clients. 714 F.2d at 1560. The attorney's conduct was not directed toward witnesses. But neither did it involve the other individuals specifically mentioned in the first two clauses in Section 1503—jurors or court officers. Indeed, the conduct in *London* was less related to jurors than was respondent's conduct; respondent's conduct was designed to affect grand jurors, in the sense of interfering with their investigation of the facts. In short, if the omnibus clause was correctly applied in *London*, as respondent argues, see Resp. Br. 21 n.10, it follows *a fortiori* that it applies to his own conduct.

out to cover a prospective witness, a mere false statement is not one of those circumstances." He reasons that "[i]n addition to punishing one who 'corruptly * * * endeavors to influence, obstruct, or impede,' the statute prohibits the use of 'threats,' 'force,' 'threatening letter[s] or communication[s],' 'intimida[tion],' and 'injur[y]' to 'person or property.'" Resp. Br. 23. According to respondent, "[a]ll of the prohibited activities [in Section 1503] involve varying degrees of forceful persuasion," while "[a] simple false statement does not." Resp. Br. 24.

Respondent's argument is mistaken. Initially, it is not true that, aside from the omnibus clause, "all" of the prohibited activities in the earlier portions of Section 1503 "involve varying degrees of forceful persuasion." For example, bribing a juror to return a favorable verdict or bribing a judge to give a favorable sentence could not be characterized as "forceful persuasion". Nor could falsely informing a juror that a trial was not being held on a given date, in order perhaps to provoke a mistrial. Yet those forms of conduct would fall squarely within the language of the earlier portions of Section 1503. Moreover, many of the forms of conduct that have always been thought to be prohibited by the omnibus clause, such as alteration or forgery of documents for presentation to a grand jury, see pp. 4-5, *supra*, or disclosure of grand jury information protected by Fed. R. Crim. P. 6(e), see *United States* v. *Jeter*, 775 F.2d 670, 676-677 (6th Cir. 1985), cert. denied, 475 U.S. 1142 (1986), have nothing to do with "forceful persuasion" or, indeed, with any other form of persuasion. The omnibus clause of Section 1503 should not be limited to instances of "forceful persuasion."

2. With respect to the wiretap disclosure statute, 18 U.S.C. 2232(c), respondent concedes that there is no

dispute concerning the knowledge or intent elements of the offense. Resp. Br. 38-39. It must be assumed, for purposes of this Court's decision, that respondent knew of the April 1987 application to wiretap Tham's phones, as to which Chapman was a named interceptee. See Gov't Exh. 18B, at 2. It also must be assumed that respondent disclosed that application "in order to obstruct, impede, or prevent" the interception. 18 U.S.C. 2232(c). The only dispute now concerns the interpretation of the word "possible" in the statutory requirement that the defendant be shown to have "give[n] notice * * * of the possible interception." *Ibid.*

a. As we explain in our opening brief (U.S. Br. 46-47), the term "possible" in Section 2232(c) brings within the statute a person who has knowledge of a wiretap or application—but who does not know whether or when that application was granted or if interceptions will actually occur—if he discloses to any person information about the wiretap in order to obstruct interceptions. Once the defendant learns of the application or authorization, the statute prohibits him from disclosing the "possible" interception that, based on the defendant's knowledge, might result. Read in context, the term "possible" refers to what it is that the defendant has to disclose: the information that he has learned about the possibility, not the certainty, of interceptions.

Respondent argues that the term "possible" was included in the statute not to broaden its coverage, but to restrict it. Respondent asserts that by virtue of the term "possible," "[o]nce a wiretap has expired, or an application for authorization has been denied, Section 2232(c) no longer prohibits its disclosure." Resp. Br. 36. The only purpose of such a limitation would be to protect an individual who intends to obstruct a wiretap by giving notice of it even though, unbeknownst to him, it was

denied or is no longer in operation. As we explain in our opening brief (U.S. Br. 41), that interpretation flies in the face of Congress's intent, which was to proscribe the "conduct of giving notice of the possible interception to any person who *was or is* the target of the interception." S. Rep. No. 541, 99th Cong., 2d Sess. 34 (1986) (emphasis added). It is also inconsistent with Congress's decision to extend Section 2232(c) to attempts to give notice, thereby prohibiting even the effort to achieve the forbidden end.

Respondent's interpretation is also untenable because it would create a series of anomalous, windfall defenses to a Section 2232(c) prosecution. There are numerous reasons why interception of a target's conversations might not be "possible," in the sense that, no matter how hard the defendant tried to obstruct the interception, the defendant could not possibly succeed. Those include the expiration of a wiretap or denial of an application. But they also include the defendant's having moved to a new address, a mechanical malfunction, or the like. See U.S. Br. 47. Such defenses, like that urged by respondent, could be framed in terms of the "impossibility" of an interception occurring. Yet none of them would be plausible, for the same reason that respondent's defense is not plausible. If, in light of the defendant's knowledge, an interception is "possible" because he has learned of a wiretap or an application, the defendant cannot gain immunity by showing that the interception was "impossible" for some reason entirely unknown to him.

Respondent tries to escape the consequences of his argument by briefly referring to the doctrine of legal impossibility, claiming that "it is apparent on the face of the statute that Congress was concerned with legal possibility, not factual possibility." Resp. Br. 44 n.33. The face of the statute, however, simply uses the term

"possible," and there is no basis for distinguishing a mechanical breakdown, say, from an expiration of an ongoing wiretap. As we have argued above, Congress's intent in using the term "possible" was not to provide defendants with windfall defenses based on facts that they were unaware of, but to make clear that by disclosing their knowledge of the possibility of interceptions they have committed a crime, whether or not interceptions actually occur. Moreover, insofar as respondent is referring to the doctrine of "legal impossibility," that doctrine provides only that "[i]f * * * what the defendant set out to do is not criminal, then the defendant is not guilty of attempt." 2 Wayne LaFave & Austin Scott, Jr., *Substantive Criminal Law* § 6.3(a) at 40 (1986); see generally *id.* § 6.3(a)(3) at 44-49. In this case, what respondent set out to do—interfere with the interception of which he had knowledge—*was* criminal. Accordingly, the doctrine of legal impossibility would not provide him with a defense.[9]

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[9] Legal impossibility, as a defense to criminal charges distinct from the defense that the defendant's conduct simply did not violate the statute, has been "criticized by many commentators and rejected in the Model Penal Code and in virtually all of the recent recodifications." 2 LaFave & Scott, *supra*, § 6.3(a)(3) at 46 (footnotes omitted). The Model Penal Code, for example, provides that a defendant is guilty of attempt if he "purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be." § 5.01(1)(a). The drafters of the Code note that "[t]he impossibility defense is rejected, liability being focused upon the circumstances as the actor believes them to be rather than as they actually exist." 1 *Model Penal Code & Commentaries* § 5.01, at 297 (1985); see also *id.* at 307-317. It is clear in this case that respondent believed the "circumstances" to be that the wiretap of which he had knowledge was still in operation at the time of his disclosure. As he said three

b. Respondent argues (Resp. Br. 44-47) that the First Amendment requires the government to demonstrate a compelling interest before it may prohibit the disclosure of wiretap information. Demonstrating such an interest, in respondent's view, requires engrafting a "pending application or actual wiretap" requirement onto the statute.

Respondent is correct that the government may not generally restrict individuals from disclosing information that lawfully comes into their hands, absent a "state interest of the highest order." *Smith* v. *Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979). The statute does not, however, generally impose such a restriction, since it applies only to those who disclose wiretap information "in order to obstruct, impede, or prevent" the interception. See U.S. Br. 47-48. Equally important, respondent was not simply a member of the general public who happened lawfully to come into possession of information about a wiretap. Instead, he was a federal district court judge, who learned of confidential wiretap information in the course of his official duties and disclosed it in an attempt to obstruct the wiretap.[10]

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months later, "[o]h yeah the phone's definitely tapped. * * * Absolutely." J.A. 21.

[10] Respondent does not dispute that Judge Peckham disclosed the information about the wiretap application to respondent as a confidential matter, in order to preserve the court's integrity. See U.S. Br. 4. Respondent himself admitted both to Solomon and to his nephew that Judge Peckham was the source of his knowledge. See U.S. Br. 37-38. Thus, although respondent's recollection may have been jolted by his observation of an FBI surveillance vehicle, see Resp. Br. 45 n.34, there was no doubt that his knowledge arose from Judge Peckham's disclosure. In those circumstances, the fact that respondent's recollection may have been refreshed by his observation of the FBI vehicle did not create any First Amend-

Government officials and others in sensitive and confidential positions have special duties of non-disclosure. See Fed. R. Crim. P. 6(e) (prohibiting disclosure of grand jury information); *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 31 (1984) (protective orders in civil discovery do not violate First Amendment). Since such duties are assumed voluntarily, the government need not justify them on the basis of the same stringent standards that would apply to efforts to impose such duties on unwilling members of the public. For example, no such stringent standard was imposed in *Snepp* v. *United States*, 444 U.S. 507, 511 & n.6 (1980) (per curiam), before the Court concluded that the government could enforce its right to prepublication review of a former CIA agent's book.[11]

In any event, the government's interest in protecting the secrecy of wiretap information is substantial. Under 18 U.S.C. 2518(5), no wiretap authorization or extension may last more than 30 days, and the government is under a duty to limit the length of wiretaps to what is necessary. See also 18 U.S.C. 2518(3) (showings government must make to obtain wiretap or wiretap extension).[12] Thus, wiretaps are commonly authorized,

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ment issue for the jury, and the trial court properly refused respondent's instruction on the issue. J.A. 127.

[11] *Snepp* is particularly instructive, because the government in that case conceded that the agent's book did not contain any classified information. 444 U.S. at 510. Under respondent's standard, that fact would have certainly foredoomed any effort by the government to show a compelling interest in having the book submitted for prepublication review.

[12] Indeed, although 18 U.S.C. 2518(8)(d) provides that inventories of intercepted conversations must be served on the named interceptees within 90 days of termination of the wiretap order, that statute provides that upon an *ex parte* showing of good cause, the court may extend that date. In this case, the

extended, and reauthorized as needed from time to time in the course of a criminal investigation. See U.S. Br. 43 n.10. Consequently, the government has a powerful interest in precluding disclosure of wiretaps for at least as long as it remains a possibility that they will be in force or that an extension or reauthorization will be sought or ordered. In this case, that period certainly extended through the time that petitioner disclosed the wiretap.[13]

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government sought and obtained such extensions for the Tham wiretap until May 1989, based upon the need to ensure the integrity and confidentiality of the wiretap and the investigation. See Gov't Exh. 20(a)-20(n).

[13] Respondent acknowledges that there were subsequent wiretaps on Tham's phone until after respondent made his disclosure. But he asserts that "there is no evidence in the record that Chapman was named as an interceptee of these subsequent wiretaps." Resp. Br. 5. That statement is mistaken. All of the wiretap orders were in evidence at respondent's first trial (and thus in the record in this case), and showed that Chapman was a named interceptee in all but one of those orders. Since the scope of the wiretaps was not an issue on which the jury had to reach a decision, it was determined that the later wiretap orders did not have to be introduced in evidence at the second trial. But the jury was given evidence that, by August 1987, the FBI had prepared "a Title III [*i.e.*, wiretap] affidavit for 5 telephone lines utilized by * * * Tham, which alleges * * * violations involving Tham's association with Abe Chapman," and that the FBI "intend[ed] to further monitor Chapman's activities in order to determine the full extent of his relationship with Judge Aguilar." Gov't Exh. 25 (Def's Exh. 5), at 5-6. Moreover, all of the wiretap orders were provided to defense counsel before the intercepted conversations were introduced in evidence, as required by 18 U.S.C. 2518(9). Defense counsel have not before challenged—and apparently do not now challenge—that Chapman was in fact a named interceptee.

c. In a similar vein, respondent's amicus argues that, because in its view our interpretation impermissibly "extends the statute's proscription beyond those instances in which the person disclosing had * * * a duty to keep the disclosed information confidential," Nat'l Ass'n of Criminal Defense Lawyers Br. 5, respondent should be permitted to mount an overbreadth challenge to the statute to protect individuals who come upon wiretap information innocently and legally, but who disclose it in order to obstruct the possible interception. See also Resp. Br. 45 n.34.

Respondent himself cannot raise a First Amendment claim based on the application of the statute to individuals who have no "duty to keep the disclosed information confidential." Nor is respondent assisted by the overbreadth doctrine. Under settled law, "where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only 'real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'" *Osborne* v. *Ohio*, 495 U.S. 103, 112 (1990) (quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973)). A person may be prosecuted under Section 2232(c) only if he has obtained the highly confidential information that a wiretap has been applied for or authorized and intends to obstruct it, *i.e.*, does not know that it is not in operation. The premise of the statute is that, in light of the great care with which information on wiretaps in active investigations is safeguarded, most people in a position to violate the statute will be government officials and employees, such as judges, lawyers for the Department of Justice, and FBI agents, who have a special obligation to keep the information confidential. Even if application of the statute to individuals who have no special duty of confidentiality

would raise First Amendment concerns, there is no reason to believe that those instances would be "substantial * * * in relation to the statute's plainly legitimate sweep."

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

MARCH 1995

(7)

No. 94-270

In the Supreme Court of the United States

OCTOBER TERM 1994

UNITED STATES OF AMERICA,

Petitioner,

v.

ROBERT P. AGUILAR,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation with a membership of more than 8,000 attorneys and 28,000 affiliate members, including representatives from all fifty states. The American Bar Association recognizes the

NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers. Among the NACDL's stated objectives is the promotion of the proper administration of criminal justice. Thus, the members of the NACDL have a vital interest in insuring that the integrity of the federal and state systems of criminal justice are protected. This includes an interest in insuring that 18 U.S.C. §2232(c), which prohibits giving notice of an application or authorization for electronic surveillance with intent to "obstruct, impede, or prevent" such interception, or the attempt to provide such notice, is construed in a manner consistent with the protections afforded by the First Amendment to the United States Constitution.

STATEMENT

Amicus adopts respondent's statement of the case.

SUMMARY OF ARGUMENT

In contending that 18 U.S.C. §2232(c) applies to respondent's alleged conduct in this case, the government has advanced an interpretation of the statute that would infringe on speech protected by the First Amendment. If construed in the manner asserted by the government, §2232(c) would, therefore, be overbroad and unconstitutional. Since, as this Court has repeatedly instructed, statutes should be interpreted in a manner that preserves their constitutionality, the government's construction should be rejected. Accordingly,

the decision of the Ninth Circuit, which applied this guiding principle of statutory construction, should be affirmed.

The government's interpretation of §2232(c) presents intractable constitutional problems in three separate, but related, respects: (1) it would apply the statute not only to existing applications and/or authorizations for electronic surveillance, but in perpetuity even to those that had expired; (2) it would apply the statute to persons who obtained knowledge of the application or authorization lawfully, and who did not have a duty to maintain that information's confidentiality; and (3) it would apply the statute to applications for electronic surveillance that might be sought or authorized in the future.

As detailed below, if these three fatal flaws, independently or in combination, were incorporated into §2232(c), the statute would reach speech protected by the First Amendment. In order to sustain the prohibition, the government would have to cite an interest of the "highest order" that was at stake. The government has not proffered such an interest, and cannot. This Court has consistently held that criminal investigations and proceedings -- even secret grand jury proceedings -- do not constitute the requisite "higher" interest once they have expired.

Indeed, this Court has dismissed as "marginal" and "speculative" the possible future impact (on criminal investigations) of a witness's disclosure of his own testimony before a grand jury that has been discharged. In addition, this Court has also refused to uphold punishment for persons who are not bound by an obligation to keep information confidential, who obtain such information lawfully, and who then disclose such information.

In this case, the electronic surveillance disclosed by respondent had expired, and respondent did not obtain knowledge of the electronic surveillance unlawfully, or in the context of a duty to maintain confidentiality -- and, more importantly, the jury was not charged that such duty or unlawful appropriation were required under the statute. Application of the statute to these circumstances would threaten the First Amendment principles set forth repeatedly by this Court. As a result, in order to preserve §2232(c)'s constitutionality, the government's interpretation must be rejected, and the decision of the Ninth Circuit affirmed.

ARGUMENT

I. THE GOVERNMENT'S CONSTRUCTION OF §2232(c) REACHES CONSTITUTIONALLY PROTECTED SPEECH, AND THEREFORE IS OVERBROAD IN VIOLATION OF THE FIRST AMENDMENT

In its Brief submitted to this Court, the government states its interpretation of 18 U.S.C. §2232(c):

> [i]f, after acquiring knowledge of the application to intercept communications, defendant discloses the possibility of interception to others, he has violated the statute.

Petitioner's Brief at 16.[1]

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[1] Section 2232(c) reads as follows:

> Notice of certain electronic surveillance. -- Whoever, having knowledge that a Federal investigative or law enforcement has been authorized or has applied for authorization under chapter 119 to intercept a wire, oral, or electronic communication, in order to obstruct, impede, or prevent such interception, gives notice or attempts to give notice of the possible interception to any person shall be fined under this title or imprisoned not more than five years, or both.

That construction encompasses constitutionally protected speech in three particular areas, all of which are implicated in this case:

> (1) it continues the statute's proscription beyond the termination of the electronic surveillance;
>
> (2) it extends the statute's proscription beyond those instances in which the person disclosing had (a) obtained the information unlawfully; or (b) a duty to keep the disclosed information confidential; and
>
> (3) it extends the statute's proscription to potential future electronic surveillance.

Indeed, in its Brief below submitted to the Ninth Circuit, the government contended that liability under §2232(c) did not at all depend on either (a) the circumstances in which the information was obtained; or (b) whether the defendant was under any duty not to disclose. See Government's Brief on Appeal at 38. The government also claimed that whether the information disclosed was still protected was not the "determining factor" under §2232(c). See Government's Brief on Appeal at 40.

As discussed below, the government's position would make §2232(c) overbroad in violation of the First

Amendment. While First Amendment considerations may not be absolute, they can be overridden only by a government interest of the "highest order". Here, the government has not offered, and cannot offer, a countervailing interest equal in magnitude to that of the First Amendment values at stake.

Under the overbreadth doctrine as enunciated by this Court, a broad application of a statute that could cover protected speech violates the First Amendment. As this Court explained in *Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972):

> [i]t matters not that the words appellee used might have been constitutionally prohibited under a narrow and precisely drawn statute. . . . the transcendent value to all society of constitutionally protected expression is deemed to justify allowing "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity," . . . This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.

Of course, an unconstitutionally broad application of a statute is neither mandatory nor even favored; rather, as this Court has instructed, "federal statutes are to be construed so as to avoid serious doubts as to their constitutionality, and [ ] when faced with such doubts the Court will first

determine whether it is fairly possible to interpret the statute in a manner that renders it constitutionally valid." *Communications Workers of America v. Beck*, 487 U.S. 735, 762 (1988) (citations omitted).

The Ninth Circuit recognized these principles below, and held that the construction urged by the government threatened to have a "substantial" impact on First Amendment interests. Pet. App. at 11a. As a result, the Ninth Circuit, consistent with approved practice, interpreted §2232(c) in a manner consistent with First Amendment principles.

A. *Section 2232(c) Does Not Extend Beyond the Termination of the Disclosed Electronic Surveillance*

In finding that the government's interpretation of §2232(c) was overbroad, the Ninth Circuit focused on the government's contention that the statute applied to respondent even though the electronic surveillance that had been disclosed had terminated well before that disclosure. Pet. App. at 11a-12a. The Ninth Circuit properly analyzed the government's attempted application of §2232(c), since to protect the secrecy of electronic surveillance in perpetuity would stifle constitutionally protected speech even after the government's asserted interest in confidentiality had expired. *Id.*

The Ninth Circuit used as an example the disclosure of "politically-motivated wiretaps", and that example, culled from experience and not from imagination, is illustrative. *Id.* A paradigm of the type of political repercussions that disclosure and subsequent public discussion of particular instances of electronic surveillance can be found in *Halperin v. Kissinger* 606 F.2d 1192 (D.C. Cir. 1979), *aff'd by an*

equally divided Court, 452 U.S. 713 (1981), which involved electronic surveillance of thirteen government employees, including members of the National Security Council staff, and four journalists. In fact, those wiretaps became one of the articles of impeachment against President Richard M. Nixon. *See Nixon v. Administrator of General Services*, 433 U.S. 425, 493 (1977).

Yet those important political revelations and ramifications, and public debate, might well be precluded under the version of §2232(c) urged by the government, since any journalist learning of an expired wiretap could *never*, under the government's interpretation, disclose that electronic surveillance. Nor could an academic *ever* make an historical study or analysis. Moreover, this type of speech -- "subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism" -- lies at or near the core of the First Amendment. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838-39 (1978), *quoting Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966). *See also Butterworth v. Smith*, 494 U.S. 624, 632 (1990); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979).[2]

In response, the government does not dispute that such persons could be prosecuted under its application of §2232(c). It merely argues that since an intent to "obstruct, impede, or prevent" a possible interception is required, such persons, and such speech, would not be the subject of prosecution. However, the reporter's or academic's intent

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[2] In *Landmark Communications, Inc.*, *supra*, this Court noted that "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." 435 U.S. at 838, *quoting Mills v. Alabama*, 384 U.S. 214, 218 (1966) (footnote omitted).

could very well be viewed as an attempt to "obstruct, impede, or prevent" in the context of alleging and/or exposing government overreaching and/or misconduct, including political or otherwise maliciously motivated investigations and prosecutions, and in seeking to curb such conduct. Yet that intent would place their conduct within the ambit of the government's version of §2232(c).

That danger is compounded by the government's refusal, detailed *post* at 17-19, to limit the electronic surveillance to that presently applied for, authorized, or existing. In applying §2232(c) to potential *future* electronic surveillance, the government creates the genuine threat that any article or treatise could be viewed as an intent to "impede" some future or incipient investigation contemplated after the expiration of the wiretap that is the subject of the disclosure.

Also, prescribing an infinite period of coverage under the statute would infringe on the First Amendment rights of other persons, including, in particular, attorneys. Even if, after the expiration of electronic surveillance, an attorney or other person learned (legally) of such surveillance, that attorney or other person could not, under §2232(c) as construed by the government, bring that surveillance to the attention of a news organization, a court, or a client without risking violation of the statute. Application of the government's standard would stifle public review of government and prosecutorial practices, and effectively insulate forever the policies and decision-making underlying particular instances of electronic surveillance, which constitutes perhaps the most sensitive law enforcement

technique, and the most serious threat to privacy.[3]

As noted *ante*, at 5-6, in order to impose restrictions on the exercise of First Amendment rights, the government must assert a compelling interest of the "highest order." *Smith v. Daily Mail Publishing Co.*, *supra*, 443 U.S. at 103. Moreover, the government assumes the burden of establishing the existence of that interest. *First National Bank v. Bellotti*, 435 U.S. 765, 786 (1978). As the Ninth Circuit found below, Pet. App. at 11a, and as this Court's prior decisions confirm, the interest asserted here by the government evaporates once the electronic surveillance has terminated.[4]

For example, in *Butterworth v. Smith*, *supra*, in which this Court invalidated a Florida law that prohibited a witness from ever disclosing his testimony before a grand jury, this Court held that the government's interest in maintaining the

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[3] Electronic surveillance and investigations that have concluded, and which have turned out to be unfounded, thereby not resulting in criminal charges, would not likely be the subject of public proceedings. Thus, while such instances might be the ripest area for abuse, they would remain unrevealed.

[4] The government cites *United States v. Russell*, 255 U.S. 138 (1921) (*see* Petitioner's Brief at 40) in support of its interpretation, but that case did not involve overbreadth analysis or claim any implications for protected speech, but instead focused on whether the indictment (which had been dismissed below) adequately had alleged an element of the offense charged (with this Court holding that it was sufficient in alleging that the defendant knew that a person was a petit juror summoned to appear for a criminal case, even though that person had not yet been selected or sworn). 255 U.S. at 141, 143-44.

secrecy of grand jury proceedings did not continue permanently, but ended with the discharge of the grand jury. 494 U.S. at 632. This Court also described the state's asserted interest in deterring potential future conduct -- possible subornation of perjury at trial -- as "marginal at best and insufficient to outweigh the First Amendment interest in speech involved." 494 U.S. at 633-34.

Moreover, this Court noted in *Butterworth* that the state's interest in preventing flight by targets between the time the grand jury ended and the target's arrest was only "a very speculative possibility" that was also insufficient. 494 U.S. at 632 n. 3. *See also Worrell Newspapers of Indiana, Inc. v. Westhafer*, 739 F.2d 1219, 1222 (7th Cir. 1984) (government's interest in "apprehension of criminals" insufficient to justify criminal sanctions against person who truthfully published the name of individual against whom sealed indictment had been returned), *aff'd*, 469 U.S. 1200 (1985).[5]

Here, as well, the government's asserted interest in the confidentiality of the electronic surveillance disappears once the surveillance has ceased. The possibilities of subsequent authorizations, or re-instituted investigations, are as speculative and marginal in this context as were the prospective interests the state asserted in *Butterworth*. Thus, the situation is perfectly analogous to that in *Butterworth*, in which the invalid state-mandated "ban extend[ed] not merely to the life of the grand jury, but into the indefinite future[,]"

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[5] Also, in *Landmark Communications, Inc.*, *supra*, this Court pointed out that with respect to out-of-court comments about pending cases or grand jury investigations, it had "consistently rejected the argument that such commentary constituted a clear and present danger to the administration of justice." 435 U.S. at 844.

494 U.S. at 636.

Consequently, the Ninth Circuit was correct in finding that the government's construction of §2232(c) -- which would apply the statute indefinitely even after the expiration of the electronic surveillance -- was overbroad, and in violation of the First Amendment.

B. *Section 2232(c) Does Not Extend to Disclosure of Information Obtained Legally, and For Which the Party Disclosing Was Not Under a Duty to Keep Confidential*

The government's construction of §2232(c) also extends the statute's coverage to a type of speech that this Court has heretofore not recognized as criminally punishable: the dissemination of truthful information lawfully obtained, without the disclosing party having any duty to maintain confidentiality.

The government's position is strident: even if a person obtains knowledge of the electronic surveillance lawfully, and even if that person is not under any obligation to keep that knowledge confidential, any disclosure by that person constitutes a violation of the statute. The government also contends that even if that person's knowledge of the electronic surveillance is augmented partially by *public* information, the statute still applies to any subsequent disclosure. Again, that interpretation infringes on established First Amendment freedoms, and must be rejected in order to preserve §2232(c)'s constitutionality.

Indeed, the possible adverse impact on the exercise of First Amendment rights is as dramatic in this respect as it is with respect to the government's assertion, discussed *ante*, that the statute applies indefinitely even after the electronic

surveillance terminates. For example, if a journalist were legally to learn of an electronic surveillance, *i.e.*, through a confidential source, *see Worrell Newspapers*, *supra*, 739 F.2d at 1220, or through legitimate investigative methods, *see*, *e.g.*, *Smith v. Daily Mail Publishing Co.*, *supra*, 443 U.S. at 99,[6] and even though that reporter did not have any duty to keep the information confidential, the publication or broadcast of that information would, under the government's construction, violate §2232(c). The same would be true for any other person -- academic, lawyer, or otherwise -- who, even absent any obligation to maintain secrecy or any illegal conduct in obtaining the information, disclosed such electronic surveillance.

Such an application would represent an unprecedented expansion of criminal liability for protected speech. In *Landmark Communications, Inc.*, *supra*, this Court held that the First Amendment did not permit

> the criminal punishment of third persons who are strangers to the inquiry, including the news media, for divulging or publishing truthful information regarding confidential proceedings of the Judicial Inquiry and Review Commission [of the State of Virginia].

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[6] In *Landmark Communications*, *supra*, the Court's opinion does not indicate the manner in which the news organization obtained information about a confidential judicial misconduct proceeding, except that the information was *not* obtained illegally. 435 U.S. at 837.

435 U.S. at 837.[7]

As a result, in *Smith v. Daily Publishing Co.*, *supra*, this Court noted that "state action to punish the publication of truthful information seldom can satisfy constitutional standards[,]" since " a penal sanction for publishing lawfully obtained, truthful information . . . requires the highest form of state interest to sustain its validity." 443 U.S. at 102-03.

In fact, this Court has not upheld criminal punishment for the disclosure of information lawfully obtained and revealed without any breach of duty, even though it has been asked to do so in *Landmark Communications, Inc.* and *Smith v. Daily Publishing Co.* *See also Worrell Newspapers*, *supra*, 739 F.2d at 1223 ("the [grand jury] secrecy provision in Rule 6(e) [Fed.R.Crim.P.] applies, by its terms, only to individuals who are privy to the information contained in a sealed document by virtue of their position in the criminal justice system").[8] Indeed, this Court has refused to permit

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[7] This Court reserved judgment on whether a prosecution could be sustained against "one who secures the information by illegal means and thereafter divulges it." 435 U.S. at 837.

[8] While the government argues that respondent here was burdened by a duty of confidentiality, in fact the District Court did not charge the jury that either unlawful acquisition or breach of duty of confidentiality were elements of the offense. Moreover, the government's position is clear that it believes that neither factor is relevant to liability under §2232(c). *See ante* at 5. Thus, the cases the government cites in its Brief, at 49 [*United States v. Jeter*, 775 F.2d 670 (6th Cir. 1985), *cert. denied*, 475 U.S. 1142 (1986), and *United States v. Howard*, 569 F.2d 1331 (5th Cir.), *cert. denied*, 439 U.S. 834 (1978)], are inapposite since they

recovery even in *civil* cases seeking damages for such disclosure. *See Cox Broadcasting v. Cohn*, 420 U.S. 469, 495 (1975).

Here, the government's interest is minimal, if it exists at all, since the electronic surveillance that respondent disclosed had expired almost a year earlier. *See Butterworth v. Smith*, *supra*, 443 U.S. at 1381-82 & n. 3 (once grand jury had been discharged, government's asserted interest in continued prohibition on witness's disclosure of his own testimony was at best "marginal" and "speculative"). Thus, the interest in continued secrecy with respect to electronic surveillance that had expired a year earlier cannot be sufficient to override the important First Amendment protection afforded the disclosure of information obtained lawfully and divulged in the absence of any breach of duty.

In addition, another element that compounds the overbreadth of the government's proposed construction of §2232(c) is the argument by the government, made at trial, that respondent's disclosure was precipitated not only by what he was told by Judge Peckham with respect to electronic surveillance, but also by respondent's observation of physical surveillance (a man across the street) outside his home, and that respondent's observation could be used to convict him under §2232(c). Jt. App. at 112-16. Indeed, the

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involved either persons with a duty to keep information confidential (in *Howard*, it was a court reporter who sold transcripts of grand jury proceedings), or persons who appropriated confidential materials in violation of grand jury secrecy as protected by Rule 6(e), Fed.R.Crim.P. (in *Jeter*, the defendant provided to the targets of an investigation carbon impressions of transcripts of grand jury proceedings after he had taken them from a court reporter).

jury's verdict supports the proposition that that piece of evidence was dispositive: respondent was acquitted of Count IV, which alleged disclosure *prior* to the observation on the street, but was convicted of Count VI, which alleged disclosure *after* the observation.

Thus, the government's theory, and, most likely, the jury's verdict of guilty, were premised on the consideration of what was, essentially, *public* information independently and lawfully gathered by respondent. In fact, the Ninth Circuit panel that initially heard respondent's appeal, and affirmed the conviction on Count VI, conceded that respondent's "knowledge" of the electronic surveillance ripened only after he "put two and two together" after witnessing the physical surveillance. Pet. App. at 43a.

If §2232(c) reaches persons who "put two and two together" based on their review or awareness of public documents and/or events, it would seriously impair First Amendment rights. Such an interpretation would expose to criminal prosecution those lawyers and journalists (and anyone else similarly situated) who, armed with certain information legally obtained, comb public records and information and then reach a conclusion about the existence of electronic surveillance.

For example, a lawyer or reporter might know of pre-existing but expired electronic surveillance through either a statutory interception notice received by a client, or via court proceedings or information received about them, and then, through identity of subject matter and/or overlap of participants, investigators, or prosecutors (or even rumors or reports in the media), surmise that another wiretap might exist, or have existed. The use of such information to make disclosure could, under the government's construction,

provide the basis for a prosecution under §2232(c).

That would be contrary to the explicit precedent established by this Court. As explained in *Smith v. Daily Mail Publishing Co.*, *supra*, this Court has held that "once the truthful information was 'publicly revealed' or 'in the public domain'[,]" its dissemination could not be restrained. 443 U.S. at 103. *See also Cox Broadcasting v. Cohn*, *supra*, 420 U.S. at 495 ("States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection").

Thus, disclosure based on publicly available information and publicly observed events cannot be punished under §2232(c) without infringing speech protected by the First Amendment. Moreover, this deficiency in the government's interpretation is again compounded here by the expiration of the electronic surveillance even prior to respondent's observation of the physical surveillance.

C. *Section 2232(c) Does Not Extend to Potential and/or Future Electronic Surveillance*

As a corollary to its claim that §2232(c) applies to electronic surveillance that has terminated, the government also apparently contends that the statute also protects against disclosure that might "obstruct, impede, or prevent" possible interceptions made pursuant to *potential* applications, authorizations, and electronic surveillance that might occur in the future.

While the Ninth Circuit decided below that, under §2232(c), the statutory phrase "such interception" (that the defendant must intend to "obstruct, impede, or prevent") refers to an interception pursuant to the *specific* electronic

surveillance that is disclosed (*see* Pet. App. at 8a-9a), that government argues instead that "the government need *not* prove that the actual wiretap was in operation or that the authorization for a wiretap was pending at the time the disclosure was made." Petitioner's Brief at 46 (emphasis in original). *See also* Petitioner's Brief at 39 ("[a] defendant can intend to obstruct a wiretap that is not in operation, or even a wiretap that was never authorized"). The government's subsequent references to the potential for "successive" wiretap applications, and "reauthorizations" (as opposed to extensions) make it clear that the government's position would apply §2232(c) to the impact disclosures of prior, expired electronic surveillance might have on future applications and authorizations. *See* Petitioner's Brief at 42-44 & n. 11.

As discussed *ante* at 10-12, any interest the government might assert with respect to future electronic surveillance would not suffice to overcome the important First Amendment principles at stake. *See Butterworth v. Smith*, *supra*; *Worrell Newspapers*, *supra*. Under the government's construction, even persons who receive statutory notices of interception could not disclose the electronic surveillance (even to their lawyers) for fear that it might be deemed an attempt to "obstruct, impede, or prevent" some future interception the government might seek subsequent to the expiration of the disclosed electronic surveillance.

Indeed, the government's inflexible resistance to *any* time limitation on the ambit of §2232(c), and/or to any limitation to particular applications and authorizations (and possible interceptions thereunder), completely undermines its insistence that the overbreadth of its interpretation is cured by the requirement that the defendant's intent be to "obstruct,

impede, or prevent" an interception.

As noted *ante* at 7-9, if §2232(c) applies to all possible electronic surveillance in perpetuity, and someone, such as a journalist, or lawyer, or academic, discloses prior electronic surveillance with the intent of curtailing future abuse of electronic surveillance, then the intent element will have been satisfied, since the intent clearly would be to "impede" future interceptions of the same ilk.

The practical effect of the government's construction of §2232(c) would be to deprive the public permanently of information about particular instances of electronic surveillance. That is speech at the very "core" of the First Amendment, and the Ninth Circuit was correct in determining that the government's interpretation would infringe on constitutionally protected speech, and was therefore overbroad. Accordingly, it is respectfully submitted that the decision of the Ninth Circuit -- that §2232(c) be construed in a fashion that preserves its constitutionality, and which compels reversal of respondent's conviction under §2232(c) -- should be affirmed.

CONCLUSION

Because under the government's construction of §2232(c) the statute would reach constitutionally protected speech and therefore be overbroad in violation of the First Amendment, it is respectfully submitted, for all the reasons set forth above, as well for those set forth in Respondent's Brief, that the decision of the United States Court of Appeals for the Ninth Circuit be affirmed.

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Respectfully submitted,

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